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IN THE
# Supreme Court of the United States

LLOYD A. GOOD, JR.,
*Petitioner,*

v.

UNITED STATES,
*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Federal Circuit erred in holding—contrary to *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), and in conflict with the decisions of many other federal courts of appeals and state appellate courts—that a government regulation depriving a property owner of all economically viable use of his land does not result in a *per se* or categorical taking under *Lucas* unless the property owner can also prove "reasonable, investment-backed expectations."

2. Whether the Federal Circuit erred in holding that a property owner who is denied federal permission to develop his property because of the presence of endangered species lacks a reasonable expectation of developing the property—even though he purchased it *prior to* enactment of the Endangered Species Act and the listing of the species in question—because he should have been aware that "the growing consciousness of and sensitivity toward environmental issues" would ultimately change "the regulatory climate" so as to bar his planned development.

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v.

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Lloyd A. Good, Jr., respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Federal Circuit in this case.

## OPINIONS BELOW

The opinion of the Federal Circuit is reported at 189 F.3d 1355 and reprinted in the appendix hereto ("App.") at 1a. The opinion of the Court of Federal Claims is reported at 39 Fed. Cl. 81 and reprinted at 16a.

## JURISDICTION

The judgment of the Federal Circuit was entered on August 31, 1999. App. 1a. The jurisdiction of the Federal Circuit was based on 28 U.S.C. § 1295(a)(3). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Takings Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use without just compensation."

## INTRODUCTION

In this case, the Federal Circuit rendered what the Department of Justice has called "a significant environmental ruling" that "sets an important precedent." *Federal Appeals Court Rules Against Developer in Precedent-Setting Property Rights Case*, DOJ Press Release (Sept. 2, 1999). The court held that the categorical rule of *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992) —that a taking occurs, without more, when a regulation deprives a property owner of all economically viable use of his land—is not categorical after all. Instead, a property owner who has suffered even a total deprivation must also show that he had reasonable, investment-backed expectations—a factor considered in ordinary takings cases. That holding is both contrary to *Lucas* and in conflict with the decisions of numerous other courts.

The Federal Circuit also held that petitioner, who was denied a permit to build on his property because of the discovery of two endangered species, lacked such reasonable expectations as a matter of law, even though he bought the property *before* the enactment of the Endangered Species Act and the placing of the species on the endangered list. The court held that in light of "the growing consciousness of and sensitivity toward environmental issues," petitioner should have foreseen that "the regulatory climate" would in the *future* bar his proposed development. Thus, the Federal Circuit held that, even if petitioner suffered a deprivation of all economically viable use of his property, and even though he purchased that property prior to the enactment of the statute that barred

his plans, he was not entitled to compensation. The decision below plainly warrants this Court's review.

## STATEMENT OF THE CASE

1. In 1973, petitioner Lloyd A. Good, Jr., and his mother purchased 40 acres of undeveloped land in the Florida keys known as "Sugarloaf Shores" for approximately $93,000.[1] Good invested an equivalent amount in the land over the years trying to develop the property. Good first took steps to develop the property in 1980, when he hired a land planning and development firm. App. 2a, 20a-21a.

In March 1981, Good submitted a permit application to the United States Army Corps of Engineers ("Corps"). Good proposed filling or excavating approximately 13 acres of salt marsh to develop a 54-lot subdivision and a 48-slip marina. The Corps granted the requested permit in May 1983. The Corps also issued Good a modified permit in January 1984. Under both permits, all work had to be completed within five years. App. 2a-3a.

Good also pursued the necessary state and county approvals and received permits from the Florida Department of Environmental Regulation and the Monroe County Commission in 1983 and 1984, respectively. At this point, in mid-1984, Good had received federal, state, and county approval to develop his property. App. 3a.

In September 1984, however, the Florida Department of Community Affairs appealed the county's approval to the Florida Land and Water Adjudicatory Commission ("FLAWAC"), which, in 1986, ordered the county to review the project under a more stringent standard. Good filed suit against FLAWAC, challenging its order as an

[1] Sugarloaf Shores was included in a group of properties the Goods purchased for $2 million. Good inherited his mother's 30% interest in the property upon her death in 1975. App. 20a & n.2.

uncompensated taking and an unreasonable exercise of police power. That suit was settled in 1987. The action therefore returned to the county which, in November 1989, once again granted preliminary approval of Good's plans. App. 4a-5a.

The FLAWAC proceedings and litigation consumed most of the five-year limit on Good's permit from the Corps. The Corps, however, granted Good a new permit in October 1988 allowing substantially the same development. In July 1990, out of caution that final county approval of his plans for 54 lots and 48 slips might be denied, Good submitted a second permit application to the Corps for a scaled-down development consisting of only 16 homes, a canal, and a tennis court. App. 5a-6a.

Subsequent to the issuance of Good's 1988 permit, however, the Lower Keys marsh rabbit was listed as an endangered species under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* The Corps therefore consulted with the Fish and Wildlife Service ("FWS") to ensure that the requested new permit would not jeopardize the marsh rabbit. App. 6a.

In February 1991, the FWS issued a biological opinion in which it concluded that the project proposed in Good's 1990 permit application would not jeopardize the marsh rabbit but nevertheless recommended that the permit be denied. Shortly after the FWS issued its opinion, the silver rice rat was also listed as an endangered species. In December 1991 FWS issued a second biological opinion concluding that both the 1988 and 1990 plans would jeopardize the marsh rabbit as well as the silver rice rat. The new opinion recommended that the Corps deny Good's 1990 permit application and modify the 1988 permit along lines suggested by FWS. App. 6a-7a.

In March 1994, the Corps denied Good's 1990 permit application based on the threat to the endangered rabbit

and rat. It also informed Good that his 1988 permit had expired. App. 7a.

2. In July 1994, Good filed suit in the Court of Federal Claims alleging that the Corps' denial of his 1990 permit application violated the Takings Clause of the Fifth Amendment. He argued that the Corps' "denial of his 1990 permit application pursuant to the Endangered Species Act ('ESA') of 1973, 16 U.S.C. §§ 1531-1543 (1994), deprived his property of all economic value, and that his claim therefore falls squarely within the *per se* takings rule of *Lucas* * * *." App. 16a-17a. He argued "in the alternative that even if his claim does not fall within the *Lucas per se* rule, he had reasonable investment-backed expectations in his development plans, and therefore can demonstrate a taking under *Penn Central Transportation Co.* v. *New York*, 438 U.S. 104 (1978)." App. 17a.

The Court of Federal Claims recognized that *Penn Central* "identified three factors to consider in analyzing a regulatory takings claim: the character of the government action, the economic impact of the regulation, and the extent to which the regulation interferes with reasonable, investment-backed expectations." App. 43a. The Court of Federal Claims also recognized that in *Lucas* this Court had articulated a "*per se* rule" that "a regulation depriving property of all economic value would give rise to a taking without considering the other *Penn Central* factors." App. 44a. Nevertheless, the Court of Federal Claims granted summary judgment in favor of the government, holding that the 1990 permit denial did not constitute a taking under the *per se* rule of *Lucas* or the multi-factor analysis of *Penn Central*. App. 18a.

3. a. The Federal Circuit affirmed.[2] Significantly, the court did not dispute Good's contention that he had been deprived of all economically viable use of his property. App. 9a. Instead, the court held, as a matter of law, that even such a total deprivation is insufficient to establish a *per se* taking under *Lucas*.

The Federal Circuit stated that "[r]easonable, investment-backed expectations are an element of *every* regulatory takings case." App. 10a (emphasis added) (citing *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994)). Good had argued that no such showing need be made to establish a categorical taking under *Lucas*, but the Federal Circuit disagreed, saying that "we agree with the *Loveladies Harbor* court that the Supreme Court in *Lucas* did not mean to eliminate the requirement for reasonable, investment-backed expectations to establish a taking." App. 10a. The Federal Circuit explained:

> It is true that the Court in *Lucas* set out what it called a "categorical" taking "where regulation denies all economically beneficial or productive use of land." 505 U.S. at 1015. The *Lucas* Court, however, clarified that by "categorical" it meant those "categories of regulatory action [that are] compensable without case-specific inquiry *into the public interest advanced in support of the restraint.*" *Id.* (emphasis added). A *Lucas*-type taking, therefore, is categorical only in the sense that the courts do not balance the importance of the public interest advanced by the regulation against the regulation's imposition on private

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[2] Since the Court of Federal Claims ruled on a motion for summary judgment, the Federal Circuit correctly recognized that it had to view the facts in the light most favorable to Good and could affirm only if the government were entitled to judgment as a matter of law. App. 8a.

property rights. [App. 10a-11a (emphasis and brackets added by the Federal Circuit).]

b. Good "alternatively argue[d] that he *had* reasonable, investment-backed expectations of building a residential subdivision on his property." App. 11a (emphasis in original). He contended that "since the ESA [Endangered Species Act] did not exist when he bought his land, he could not have expected to be denied a permit based on its provisions." App. 12a. The Federal Circuit, however, held that Good's "lack of reasonable, investment-backed expectations defeats his takings claim as a matter of law." App. 15a.[3]

While conceding that Good's "position is not entirely unreasonable," the Federal Circuit said that "we must ultimately reject it" in "view of the regulatory climate that existed when [Good] acquired the subject property." App. 12a. The Federal Circuit explained that, although the ESA had not yet been enacted when Good purchased the property in 1973, between that year and 1980—when Good first took steps to develop the property—"public concern about the environment resulted in numerous laws and regulations affecting land development" and this "rising environmental awareness translated into ever-tightening land use regulations." App. 13a, 14a. Good, said the court, must "be presumed to have been aware of the greater general concern for environmental matters during the period of 1973 to 1980." App. 14a.

The Federal Circuit thus concluded that "[i]n light of the growing consciousness of and sensivitivity toward environmental issues, [Good] must also have been aware

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[3] Good signed a contract to purchase the property on April 18, 1973, and closed on the property on October 8, 1973. App. 20a. The ESA was enacted in December 1973. App. 13a. The marsh rabbit and silver rice rat were not placed on the endangered species list until 1990 and 1991, respectively. App. 6a-7a.

that standards could change to his detriment, and that regulatory approval could become harder to get." App. 15a. In other words, the Federal Circuit held that, even though the ESA had not yet come into existence when Good purchased his property, and even though the two protected species on his property had not yet been listed as endangered, Good lacked a reasonable expectation of building on the land—as a matter of law—because he should have foreseen that the wave of environmentalism in the 1970s would result in laws and regulations precluding him from developing his property.

## REASONS FOR GRANTING THE WRIT

### I. THE FEDERAL CIRCUIT'S DECISION IS CONTRARY TO *LUCAS* AND CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL AND STATE APPELLATE COURTS.

In this case, the Federal Circuit squarely held that a regulation depriving a property owner of all economically viable use of his property is not a categorical taking under *Lucas*; the property owner must also satisfy the reasonable, investment-backed expectations prong of the *Penn Central* test. As shown below, that holding is contrary to the *per se* rule of *Lucas* and conflicts with numerous other federal and state appellate court decisions, as well as critical commentary.

#### A. The Federal Circuit Misconstrued The Categorical Rule Of *Lucas*.

1. In *Lucas*, this Court explained that there are two types of takings cases "in which we have found categorical treatment appropriate." 505 U.S. at 1015. "The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property." *Id.* (citing *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). The second is "where regulation denies all economically beneficial or productive use of

land." *Id.* *Lucas* involved the second category—the " 'total taking.' " *Id.* at 1030. The Court explained that, without more, "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019 (emphasis in original).[4] The Court made clear that the " 'total taking' inquiry" (*id.* at 1030) is a *per se* rule. Cases involving deprivations of all economic value, said the Court, are subject to "categorical formulation" and obviate the need for "case-specific inquiry." *Id.* at 1019 n.8, 1015. *See id.* at 1026 ("our categorical rule [is] that total regulatory takings must be compensated").[5]

The Federal Circuit's holding that a deprivation of all economically viable use, by itself, is *not* enough to establish a *per se* taking is a blatantly incorrect misreading of *Lucas*. In *Lucas* this Court specifically contrasted its "categorical formulation" with "takings analysis generally," in which the extent of a property owner's reasonable, investment-backed expectations is a relevant factor. *Id.* at 1019 n.8 (citing *Penn Central*). When a property owner suffers less than a total deprivation, the multi-factor *Penn Central* test—including the expectations factor—applies. That factor is not considered in a *Lucas*-type case.[6]

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[4] The Court recognized a single exception to the *per se* rule. A regulation that renders property valueless is not a taking if the regulation merely prohibits uses of property that were already impermissible under "background principles of the State's law of property and nuisance." 505 U.S. at 1029.

[5] *See also Lucas*, 505 U.S. at 1046-47 (Blackmun, J., dissenting) ("From now on, there is a categorical rule finding these regulations to be a taking unless the use they prohibit is a background common-law nuisance or property principle."); *id.* at 1067 (Stevens, J., dissenting) (referring to the Court's "*per se* rule for total regulatory takings"); *id.* at 1076 (statement of Souter, J.) ("the concept of total (and, in the Court's view, categorically compensable) taking").

[6] In *Lucas*, the South Carolina Supreme Court, while concluding (wrongly) that regulations depriving all economic value do not

2. The Federal Circuit seized upon this Court's statement that there are two " 'categories of regulatory action [that are] compensable without case-specific inquiry *into the public interest advanced in support of the restraint.*' " App. 10a-11a (quoting *Lucas*, 505 U.S. at 1015) (emphasis and brackets added by the Federal Circuit). Based on this, the Federal Circuit held that "[a] *Lucas*-type taking, therefore, is categorical only in the sense that the courts do not balance the importance of the public interest advanced by the regulation against the regulation's imposition on private property rights." App. 11a. But the Federal Circuit overlooked the context in which the statement was made. In *Lucas*, the South Carolina Supreme Court had rejected David Lucas' takings claim on the ground that the State had an important public purpose in preserving its beaches. *See* 505 U.S. at 1009-10, 1020-22. Thus, the point of this Court's statement was that the South Carolina Supreme Court had erred in holding that the public interest behind a regulation can defeat a takings claim when the regulation deprives all economically viable use of property. *See id.* at 1031 ("We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest").

This Court surely did not mean to say that consideration of the public interest is the *only* factor otherwise

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necessarily result in a taking, conceded that "[i]f Lucas can demonstrate a deprival of all economically viable use of his land, there is no need to weigh factors such as the economic impact of the regulation and/or the regulation's interference with investment backed expectations. Such a showing by Lucas would by necessity weigh these factors in his favor." *Lucas* v. *South Carolina Coastal Council*, 404 S.E.2d 895, 900 n.3. (S.C. 1991), *rev'd*, 505 U.S. 1003 (1992). The views of the Federal Circuit are thus even more extreme than those of the South Carolina Supreme Court rejected in *Lucas*.

relevant to takings analysis that is omitted in a *Lucas* case. The Court cited that factor only as an example. *See Steinbergh v. City of Cambridge*, 604 N.E.2d 1269, 1273 (Mass. 1992) (deprivation of all economic value is a taking under *Lucas* "without regard to other considerations, *such as* the public interest sought to be advanced") (emphasis added), *cert. denied*, 508 U.S. 909 (1993); *Woodbury Place Partners* v. *City of Woodbury*, 492 N.W.2d 258, 260 (Minn. Ct. App. 1992) (*Lucas* "recognized two categories of regulatory action that constitute compensable takings without a case-specific inquiry *or* balancing of public and private interests") (emphasis added), *review denied* (Minn.), *cert. denied*, 508 U.S. 960 (1993).[7]

3. It is clear that consideration of investment-backed expectations plays no role in the other category of *per se* takings. In *Loretto*, this Court held that a permanent physical occupation of property "is a taking without regard to other factors that a court might ordinarily examine." 458 U.S. at 432. And the Court contrasted this *per se* rule with the "ordinar[y] ad hoc inquiry" in which "the extent to which [a regulation] interferes with investment-backed expectations" is relevant. *Id.* Thus, the Court held the physical invasion at issue (a New York law requiring property owners to permit the installation of cable television lines) was a taking despite the New York Court of Appeals' ruling that the law did "*not* interfere with any reasonable investment-backed expectations." *Id.* at 425 (emphasis added). It would be odd indeed for expectations to be relevant to one kind of categorical takings analysis but not to the other, especially since one of the reasons for the *Lucas* rule is that "total deprivation of beneficial uses is, from the land-

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[7] *See also Babbitt* v. *Youpee*, 519 U.S. 234, 243 n.3 (1997) (distinguishing the *Penn Central* test from "the more stringent analysis employed in *Lucas*").

owner's point of view, *the equivalent of* a physical appropriation." 505 U.S. at 1017 (emphasis added).[8]

### B. The Federal Circuit's Decision Conflicts With The Decisions Of Numerous Other Federal And State Appellate Courts.

1. The Federal Circuit's reading of *Lucas* squarely conflicts with that of the Ninth Circuit. In *Dodd* v. *Hood River County*, 136 F.3d 1219, 1228 (9th Cir.), *cert. denied*, 119 S. Ct. 278 (1998), the Ninth Circuit held as follows:

> In *Lucas*, the Supreme Court held that there is a categorical taking when a regulation prohibits all economically beneficial use of land, and no balancing of other factors commonly analyzed in takings law—reasonable investment backed expectations and legitimate government interest—would be necessary.

The Ninth Circuit went on to say that the *Penn Central* test is used when "there has been no categorical taking" and the "government regulation prohibits something less than all economically beneficial use." *Id.*

In *Del Monte Dunes at Monterey, Ltd.* v. *City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999), the City denied Del Monte a permit to develop its ocean-front property into a residential complex. The Ninth Circuit held that the jury properly "found the City liable for a taking because it denied Del Monte all economically viable use of its property." 95 F.3d at 1432. The court noted that "compensation is required where regulations 'leave the owner of land without economically beneficial or productive options for its use.' " *Id.* (quot-

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[8] The Federal Circuit's view that "[r]easonable, investment-backed expectations are an element of *every* regulatory takings case," App. 10a (emphasis added), is demonstrably incorrect. *See, e.g., Hodel* v. *Irving*, 481 U.S. 704, 715 (1987) (finding a taking even though presence of such expectations was "dubious").

ing *Lucas*, 505 U.S. at 1018). In contrast, said the court, "where an owner is denied only some economically viable uses, a taking may still have occurred where government action has a sufficient economic impact *and interferes with distinct investment-backed expectations*." *Id.* (emphasis added). In keeping with this distinction, the Ninth Circuit affirmed the judgment that Del Monte had been deprived of all economically viable use—and hence suffered a taking—without considering whether Del Monte had reasonable, investment-backed expectations. *See id.* at 1432-34.

*Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 34 F. Supp.2d 1226 (D. Nev. 1999), involved a takings challenge to regulations restricting development around Lake Tahoe. In keeping with the Ninth Circuit's precedents and understanding of *Lucas*, the court observed that if the regulations deprived the property owners of some, but not all, economically viable use of their land, the three *Penn Central* factors must be considered—but that if all economically viable use is denied, this "would constitute what have been referred to as 'categorical' takings *with no further inquiry necessary*." *Id.* at 1240 (emphasis added). Under this framework, the court first held that "consideration of the *Penn Central* factors clearly leads to the conclusion that there was no taking. Given the temporary nature of the regulations at issue here, we cannot say that the plaintiffs' reasonable, investment-backed expectations were unduly interfered with." *Id.* The court went on to hold, however, that a categorical taking under *Lucas* had occurred because the regulations "did in fact deny the plaintiffs all economically viable use of their land." *Id.* at 1245. The conflict between *Tahoe-Sierra* and the decision below thus could not be more direct. Under the Federal Circuit's rule, the property owners' lack of reasonable, investment-

backed expectations would have caused their *Lucas* claim to fail.

In *Chioffi* v. *City of Winooski*, 676 A.2d 786 (Vt. 1996), the plaintiff property owner was denied a permit to reconstruct a building destroyed by fire. The Vermont Supreme Court held that the "plaintiff must show a denial of all economically beneficial use to prevail." *Id.* at 790. This was so, the court explained, because the "plaintiff had no 'distinct investment-backed expectations' in restoring" the building. *Id.* (quoting *Penn Central*). Since "[a]ny expectation of a three-unit residential development was no longer 'reasonable,' * * * only the total denial of all economically beneficial use would, under the circumstances, create a taking." *Id.* (quoting *Lucas*). Thus, unlike the court below, the Vermont Supreme Court recognized that a *Lucas* claim is viable even in the absence of reasonable, investment-backed expectations.

In *McQueen* v. *South Carolina Coastal Council*, 496 S.E.2d 643 (S.C. Ct. App. 1998), *cert. granted* (S.C. Mar. 18, 1999), the property owner was denied permission to develop two beachfront lots in Myrtle Beach. Concluding that "the case at bar epitomizes a remarkable similitude to *Lucas*," *id.* at 648, the South Carolina Court of Appeals held that "McQueen has suffered a textbook taking" under *Lucas* because "the Coastal Council's denial of McQueen's permit applications for the two lots deprives him of all economically beneficial use of the land." *Id.* at 650. Notably, McQueen's expectations played no part in the court's decision, a point made clear by a dissenting judge who, relying on the same Federal Circuit case cited by the court below in this case, would have held there was no taking because McQueen lacked reasonable, investment-backed expectations. *See id.* at 652 (Connor, J., concurring in part & dissenting in part).[9]

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[9] Judge Connor wrote that in *Loveladies Harbor*, "the Federal Circuit of the United States Court of Appeals, interpreting *Lucas*

In *Adams Outdoor Advertising* v. *City of East Lansing*, 591 N.W.2d 404 (Mich. Ct. App. 1998), it was held that the City's sign code, which made unlawful and required removal of Adams' rooftop billboards, "den[ied] Adams all economically beneficial use of its property" and thus "constituted a categorical taking." *Id.* at 411, 412. The Michigan Court of Appeals quoted and followed the Michigan Supreme Court's instruction that, in cases involving a " 'categorical taking, a reviewing court need not apply a case-specific analysis, and the owner should automatically recover for a taking of his property.' " *Id.* at 411 (quoting *K & K Constr., Inc.* v. *Department of Natural Resources*, 575 N.W.2d 531, 535 (Mich.), *cert. denied*, 119 S. Ct. 60 (1998)). Only in non-categorical cases does the court consider " 'the extent by which the regulation has interfered with distinct, investment-backed expectations.' " *Id.* (quoting *K & K Constr.*, 575 N.W.2d at 539-540). Thus, the *Adams Outdoor Advertising* court held that there had been a categorical taking without any consideration of such expectations.

In *City of Miami* v. *Keshbro, Inc.*, 717 So.2d 601 (Fla. Dist. Ct. App. 1998), *review granted*, 729 So.2d 392 (Fla. 1999), property owners challenged the City's closure of their motel. The Florida District Court of Appeals held that "*Lucas* provides the controlling principles" because the City's action "denied the owners all economically beneficial uses of the property." *Id.* at 604. And

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in light of the entire history of regulatory takings, held courts must consider whether or not the property owner had distinct 'investment-backed expectations' in determining whether or not a regulatory taking had occurred. * * * Under a *Lucas* and *Loveladies Harbor* analysis, I do not believe the state has taken McQueen's property. * * * McQueen took no actions to protect his investment, and therefore failed to show he had 'investment-backed expectations' under *Lucas* and *Loveladies Harbor*." 496 S.E.2d at 652 (citations omitted).

the court rejected the City's argument that the *Penn Central* test—including consideration of "the extent to which the regulation interferes with distinct investment-backed expectations," *id.* at 603—should be applied. The court held that "[i]n this case, however, we are not faced with the *Penn Central* test as the owners here have * * * been deprived of all economic uses of the Stardust Motel, thus *Lucas* applies." *Id.* at 603-604.

Numerous other state appellate and supreme courts have also recognized that the *Penn Central* factors—including whether the property owner had reasonable investment-backed expectations—are to be considered in a partial takings case, but not in a *Lucas* case involving deprivation of all economic value. *See Anchorage* v. *Sandberg*, 861 P.2d 554, 557 (Alaska 1993) ("cases where a regulation denies a landowner of all economically feasible use of the property" are "*per se* takings" under *Lucas*; in non-categorical cases, "courts must engage in a case-specific inquiry to determine whether governmental action effects a taking"); *Kavanau* v. *Santa Monica Rent Control Bd.*, 941 P.2d 851, 860 (Cal. 1997) ("When a regulation * * * does not deprive the property owner of all economic use of the property, a reviewing court must evaluate the regulation in light of the 'factors' * * * in *Penn Central*"), *cert. denied*, 118 S. Ct. 856 (1998); *Central Colo. Water Conservancy Dist.* v. *Simpson*, 877 P.2d 335, 346-347 (Colo. 1994) (under *Lucas*, "regulations that effectively deny all economically beneficial use of land" are "prima facie takings"; "When a challenged regulation does not * * * render the property economically useless, the Court has adopted a factually based approach that encompasses such factors as * * * interference with reasonable investment-backed expectations"); *Bormann* v. *Board of Supervisors*, 584 N.W.2d 309, 316 (Iowa 1998) ("There are two categories of state action that *must* be compensated without any further inquiry

into additional factors"; "in all other cases" a court "engages in a case-by-case examination" of the *Penn Central* factors) (emphasis in original), *cert. denied*, 119 S. Ct. 1096 (1999); *Steinbergh* v. *City of Cambridge*, 604 N.E.2d at 1274 (Mass. 1992) ("If the governmental regulation neither results in a physical invasion of the property nor deprives a landowner of all economically beneficial use of land, there may nevertheless be a regulatory taking based, in part, on * * * the extent to which the regulation has interfered with a property owner's distinct investment-backed expectations."); *FIC Homes of Blackstone, Inc.* v. *Conservation Comm'n of Blackstone*, 673 N.E.2d 61, 67 (Mass. App. Ct. 1996) ("As provided by *Lucas* * * * if application of the wetlands by-law deprived the plaintiffs of all economically beneficial use of their property, a per se taking would have been effected"; "If, however, the regulation has resulted in less than a total loss of the economic value of the plaintiffs' property, the question * * * must be analyzed under pre-*Lucas* principles requiring the consideration of several interrelated factors [including] * * * reasonable, investments-backed expectations"), *rev. denied*, 676 N.E.2d 55 (Mass. 1997); *Clay County* v. *Harley & Susie Bogue, Inc.*, 988 S.W.2d 102, 106-107 (Mo. Ct. App. 1999) (under *Lucas* "a property owner is entitled to compensation for a regulatory taking without a 'case specific inquiry' "; if a case "does not fall into either of the[] two *per se* taking categories, courts are to undertake a factual inquiry" under *Penn Central*); *Guimont* v. *City of Seattle*, 896 P.2d 70, 76 (Wash. Ct. App.) ("If a property owner can establish a per se violation and the government cannot rebut the claim, a taking has occurred. No further analysis is required, and the owner is entitled to 'categorical treatment' and must receive just compensation under the Fifth Amendment."), *rev. denied*, 904 P.2d 1157 (Wash. 1995).

2. The Federal Circuit's reading of *Lucas* is also inconsistent with the scholarly commentary upon the decision. For example, Professor David Callies has recently written that "[t]he principle rule from *Lucas* is, of course, that when a regulation takes all economically beneficial use from an owner's land, it is a taking under the Fifth Amendment *without further investigation*" (unless the nuisance exception applies). Callies, *Regulatory Takings and the Supreme Court*, 28 Stetson L. Rev. 523, 552 (1999) (emphasis added). He noted that although the *Lucas* Court did not reject the relevance of the " 'frustration of investment-backed expectations' standard" in all takings cases, "the Court chose not to apply [it] in *Lucas* because it characterized the regulatory taking as total." *Id.* at 548. He concluded that "[t]he *Lucas* rule is categorical, or per se. * * * What the investment-backed expectations were of the owner when the property was acquired is in all probability irrelevant. That's a part of the partial takings analysis." *Id.* at 575.

Professor Callies is by no means alone in his reading of *Lucas*. *See* W. Fischel, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 61 (1995) (when "regulation leaves an owner without any economic value, the case-by-case balancing of *Penn Central* is to be discarded"); Freilich, Garvin & Martin, *Regulatory Takings: Factoring Partial Deprivations Into the Taking Equation*, in TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLLAN AND LUCAS 183 n.44 (D. Callies ed. 1996) (*Lucas* "giv[es] landowners two bites at the takings apple. First the landowner can seek to establish entitlement to a liability determination under the new categorical rule * * * and, if unsuccessful, may still present a takings claim under the traditional multifactor test of *Penn Central*"); Hetzel & Gough, *Assessing the Impact of* Dolan *v.* City of Tigard *on Local Governments' Land-Use Powers*, in TAKINGS, *supra*, at 228 ("When the

governmental action is not * * * a complete deprivation of all economically viable use, the cases will be decided by analyzing the economic impact of the regulation and the extent to which the regulation has interfered with distinct investment-backed expectations."); Washburn, "*Reasonable Investment-Backed Expectations" As a Factor in Defining Property Interest*, 49 Wash. U. J. Urb. & Contemp. L. 63, 93 n.214 (1996) ("Justice Scalia's categorical formulation does not depend on inquiry into the interference with investment-backed expectations. Justice Scalia reserved that inquiry for non-categorical cases."); Gardner, *Banking on Entrepreneurs: Wetlands, Mitigation Banking, and Takings*, 81 Iowa L. Rev. 527, 543 (1996) ("If the permit denial allows the landowner no use of the property, thereby destroying the property's value, categorical treatment is appropriate and the denial constitutes a taking *per se*. There is no need to consider any other factors; the landowner is entitled to just compensation."); Mandelker, *Investment-Backed Expectations in Taking Law*, 27 Urb. Law. 215, 224 (1995) (*Lucas*' "holding clearly means courts are not to apply the *Penn Central* balancing test if a land-use regulation is a taking per se."); Ogle, *The Ongoing Struggle Between Private Property Rights and Wetlands Regulation: Recent Developments and Proposed Solutions*, 64 U. Colo. L. Rev. 573, 583 (1993) ("Any discussion of the landowner's investment-backed expectations was conspicuously absent from the body of the [*Lucas*] opinion. Justice Scalia * * * did not include the factor as part of his categorical 'total takings' rule."); Ward, Lucas *v.* South Carolina Coastal Council*: A Categorical Rule in the Muddle of Takings Analysis*, 61 UMKC L. Rev. 165, 165 (1992) (the *Lucas* "total deprivation rule adds a second categorical rule to takings analysis where inquiry into the three traditional takings factors is not necessary").[10]

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[10] The plaintiff in *Lucas* also understood this Court's opinion to mean that "when a regulation takes all economic value, that con-

## II. THE FEDERAL CIRCUIT'S HOLDING THAT GOOD LACKED REASONABLE, INVESTMENT-BACKED EXPECTATIONS CANNOT BE RECONCILED WITH THIS COURT'S TAKINGS CASES, OTHER APPELLATE COURT DECISIONS, OR THE FACTS OF THIS CASE.

Even if this Court disagrees with our interpretation of *Lucas*, it should review the Federal Circuit's holding that, as a matter of law, Good lacked a reasonable expectation of receiving a permit to develop his property—even though he purchased it *prior* to the enactment of the Endangered Species Act and the listing of the two species—because he should have been aware that "the growing consciousness of and sensitivity toward environmental issues" would ultimately change "the regulatory climate" so as to bar his planned development. App. 15a, 12a.

1. To see the error and effect of the Federal Circuit's decision, the Court need look no further than *Lucas*. Under the Federal Circuit's approach, David Lucas' takings challenge surely would have failed. Lucas purchased two beachfront lots in Charleston County, South Carolina in 1986. He was denied a permit to build homes on those lots based on the South Carolina Beachfront Management Act of 1988. Although Lucas purchased his lots prior to the Beachfront Management Act, it is clear that his takings claim would not have survived the Federal Circuit's mode of analysis. This Court's own opinion notes that "South Carolina's expressed interest in intensively managing development activities in the so-called 'coastal zone' dates from 1977 when, in the aftermath of Congress' passage of the federal Coastal Zone Management Act of 1972, the legislature enacted a Coastal Zone

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stitutes a unique category of taking, and requires compensation from the regulating body *without meeting any other tests*." David Lucas, LUCAS VS. THE GREEN MACHINE 232 (1995) (emphasis added).

Management Act of its own." 505 U.S. at 1007 (citations omitted). *See also id.* at 1074 (Stevens, J., dissenting) ("South Carolina's Act is best understood as part of a national effort to protect the coastline, one initiated by the federal Coastal Zone Management Act of 1972."); *id.* at 1037-38 (Blackmun, J., dissenting) (noting that in 1986 South Carolina formed a "Blue Ribbon Commission on Beachfront Management"). Thus, it could have been said in *Lucas*, just as easily as the Federal Circuit said here, that "[i]n light of the growing consciousness and of sensitivity toward environmental issues, Appellant must also have been aware that standards could change to his detriment, and that regulatory approval would become harder to get." App. 15a.

The Federal Circuit's approach also would have required a different outcome in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987). In *Nollan*, this Court held that the California Coastal Council could not, consistent with the Takings Clause, condition its grant of a permit to the Nollans to rebuild their beachfront house on their agreement to grant the public an easement across their property. Justice Brennan dissented on the ground that, "[w]ith respect to appellants' investment-backed expectations, appellants can make no reasonable claim to any expectation of being able to exclude members of the public from crossing the edge of their property to gain access to the ocean." *Id.* at 857. Justice Brennan observed that the Nollans "were aware that stringent regulation of development along the California coast had been in place since at least 1976. The specific deed restriction to which the Commission sought to subject them had been imposed since 1979 on all 43 shoreline new development projects in the" area. *Id.* at 859. Thus, the Nollans "were on notice that new developments would be approved only if provisions were made for lateral beach

access." *Id.* at 860. *See also id.* at 866 (Blackmun, J., dissenting).

This Court, however, rejected the dissenters' analysis and held that the Nollans' rights were not "altered because they acquired the land well after the Commission had begun to implement its policy." *Id.* at 833-834 n.2. The Court explained that "[s]o long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id.*

2. In this case, the Federal Circuit's conclusion that Good lacked reasonable, investment-backed expectations —as a matter of law, no less—is simply insupportable. Good's permit was denied based on the Endangered Species Act and the presence of two endangered species on his property, yet Good purchased the property in 1973, eight months prior to enactment of the ESA, and some *17 years* before the marsh rabbit was listed as endangered in 1990. (The silver rice rat was listed the next year.)[11]

Good's actual notice of, or ability to foresee, what the regulatory regime might be in the future after he purchased the property is not relevant to the reasonability of his expectation of developing the property. *See Nollan,* 483 U.S. at 833-834 n.2.[12] But even if it were, Good did not

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11 The fact that Good had to obtain various permits prior to developing his property does not mean that his expectations were unreasonable. On the contrary, "the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985).

12 On the same day the Federal Circuit decided this case, the Court of Federal Claims held in *Florida Rock Industries, Inc.* v. *United States*, —— Fed. Cl. ——, 1999 WL 692836 (Aug. 31, 1999), that the Army Corps of Engineers' denial of a permit to mine limestone pursuant to the Clean Water Act was a taking. Holding that

—and could not—know or predict that he would be denied permission to develop his property based on a statute not yet enacted and the presence of species only later determined to be endangered.[13]

When Good purchased the property, he had a reasonable expectation of obtaining government approval of his development plans under the existing regulatory scheme. Indeed, the record reflects that he nearly succeeded in securing every permit he needed. As the Federal Circuit noted, by mid-1984 "Good had received federal, state, and county approval to develop the property." App. 3a. The Army Corps of Engineers granted Good no fewer than three permits or permit modifications between 1983 and 1988. App. 3a, 5a. Thus, the Federal Circuit's conclusion that Good "could not have had a reasonable expectation that he would obtain approval" to develop his property is refuted by the actual events in this case. App. 12a.[14]

3. The Federal Circuit's holding that Good lacked reasonable, investment-backed expectations despite having

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"Florida Rock's reasonable, investment-backed expectations were frustrated," the court explained that "[t]he Clean Water Act was passed *after* Florida Rock already owned the land" and thus "the Clean Water Act could not have put Florida Rock on notice that its property might be taken from it so as to destroy investment-backed expectations." *Id.* at *21 (emphasis added).

[13] Even if it could somehow be said that Good should have foreseen the passage of the Endangered Species Act, he would also have had to foresee an event 17 years down the road, because that is when the ESA first had legal effect against him upon the listing of an endangered species found on his property.

[14] That Good in his purchase contract "acknowledged both the necessity and difficulty of obtaining regulatory approval" does not mean that his expectations were unreasonable. App. 13a. If certainy were the standard, no developer could ever demonstrate reasonable expectations. Furthermore, the reason cited for that difficulty had nothing to do with endangered species.

purchased prior to the enactment of the ESA conflicts with *Gil* v. *Inland Wetlands and Watercourses Agency*, 593 A.2d 1368 (Conn. 1991). There, the property owner was "denied his fourth application for a building permit because of the perceived adverse impact that the proposed development would have had on the wetlands portion of his property." *Id.* at 1369. And although "the property was classified, at the time of purchase * * * as wetlands subject to the authority of the agency," *id.* at 1370, the Connecticut Supreme Court held that the property owner had a reasonable, investment-backed expectation that he could build upon his lot. *See id.* at 1372-74.

The decision below also conflicts with *Vatalaro* v. *Department of Environmental Regulation*, 601 So.2d 1223 (Fla. Dist. Ct. App.), *rev. denied*, 613 So.2d 3 (Fla. 1992). In that case, the property owners claimed that state wetlands protection legislation deprived them "of all economically viable or reasonable uses" of their property, but the trial court granted summary judgment against them on the ground that the State's denial of permission to build on the land "did not frustrate a reasonable and distinct investment backed expectation." 601 So.2d at 1224. The Florida District Court of Appeals, however, reversed and held that "[i]n the case at bar, all economically viable use of the property has been taken." *Id.* at 1229. And the court rejected the argument that the property owners lacked reasonable expectations because they "purchased their property *after* the enactment of the Warren S. Henderson Wetlands Protection Act of 1984." *Id.* (emphasis added). The facts of *Gil* and *Vatalaro* thus go beyond those here, since Good purchased his property *before* the enactment of the Endangered Species Act.[15]

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[15] *Cf. Steinbergh*, 604 N.E.2d at 1274 ("The challenged regulation did not interfere with the plaintiffs' investment-backed expectations.

The implications of the Federal Circuit's decision in this case are far-reaching. Under the decision below, anyone who purchased property prior to the wave of environmental legislation enacted in the 1970s can be denied the right to build on his land—without just compensation. Similarly, no one who purchases property today can be sure that he will be compensated should his currently-lawful development plans be barred by future legislation. As Professor Lynda Oswald has written, the approach taken by the Federal Circuit in this case "leads to perverse outcomes":

> If we accept the premise that enactment of one piece of legislation puts a property owner "on notice" that more restrictive regulations might be enacted in the future as well, we find ourselves faced with a *reductio ad absurdum*—the existence of the first regulation will defeat any claims the owner might have regarding the sanctity of the property interest in the future. By merely enacting one regulation (even a relatively non-intrusive one that is clearly a legitimate exercise of the police power), the government opens a path for eventual, incremental taking of the entire property interest without payment of compensation. [Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis,* 70 Wash. L. Rev. 91, 114 (1995).]

## III. THERE ARE COMPELLING REASONS TO GRANT CERTIORARI IN THIS CASE.

A number of "compelling reasons" support the grant of certiorari in this case. S. Ct. R. 10. First, as discussed above, there is a square conflict between the decision

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They acquired the property when the regulation was already in effect."); *FIC Homes of Blackstone*, 673 N.E.2d at 70 ("When FIC purchased the property in 1992, the Blackstone wetlands by-law was already in effect * * * FIC therefore had no reasonable expectation that it could build").

below and numerous other federal and state appellate decisions. Second, that stark conflict is over the correct reading of this Court's opinion in *Lucas,* an issue only this Court can resolve.

Third, the dispute over what showing is necessary to establish a categorical or *per se* taking under *Lucas* is unquestionably "an important federal question," *id.* 10(a), recurring in the law on a regular basis. As the Justice Department said in its own press release, this is a "significant" and "precedent-setting" case.

Fourth, the Federal Circuit is but one of a number of courts that are deeply confused about—if not openly hostile to—the total taking rule of *Lucas.*[16] "Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law." *Eastern Enterprises* v. *Apfel,* 118 S. Ct. 2131, 2155 (1998) (Kennedy, J., concurring in the judgment and dissenting in part). This case presents the Court with an opportunity to clarify this important area of law.

Fifth, it is extremely significant that the decision below was rendered by the Federal Circuit, which has exclusive

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[16] *See* Callies, 28 Stetson L. Rev. at 551 ("A survey of state and federal decisions reveals * * * [t]he standard for total takings is often confused with the standard for partial takings. In some instances, state courts appear to ignore the holding in *Lucas* altogether."); *id.* at 556, 557 ("As clear as *Lucas* appears to be with respect to total takings, many courts are having an inordinately difficult time applying the standard. * * * [T]here is some purposeful ignoring of the per se rule by some state and federal courts."); Abraham, *Windfalls or Windmills: The Right of a Property Owner to Challenge Land Use Regulations,* 13 J. Land Use & Envtl. L. 161, 163 (1997) ("a number of courts are not applying the *Lucas* and *Nollan* holdings."); Comment, *A Constitutionally Valid Justification for the Enactment of No-Growth Ordinances,* 19 U. Haw. L. Rev. 93, 142 (1997) ("Some lower courts * * * have shown a genuine reluctance to follow the categorical path created by Justice Scalia in *Lucas.*").

jurisdiction over appeals from the Court of Federal Claims, which, pursuant to the Tucker Act, 28 U.S.C. § 1491 (a)(1), has exclusive jurisdiction over all takings cases against the United States exceeding $10,000. *See Eastern Enterprises,* 118 S. Ct. at 2144 (plurality opinion).[17] Thus, the Federal Circuit's erroneous decision will control *every* substantial takings case brought against the federal government.

Finally, although either one of the holdings at issue in the two questions presented in this case would, standing alone, warrant review by this Court, the combination of the two holdings makes the need for review imperative. It may be no exaggeration to say that the effect of the decision below is to render this Court's "opinion in *Lucas* * * * a nullity" in the Federal Circuit. *Stevens* v. *City of Cannon Beach,* 510 U.S. 1207, 1211 (1994) (Scalia, J., joined by O'Connor, J., dissenting from the denial of certiorari).

Under the Federal Circuit's first holding, a property owner whose land has been deprived of all economic value does not have a *Lucas* claim unless he can also prove that he had reasonable, investment-backed expectations. And under the court's second holding, a property owner will be held to lack such expectations—even if nothing barred his proposed development on the day he purchased the land—if the development is contrary to some future law or as yet unpromulgated regulation. The combined effect of the two holdings may well be to make successful *Lucas* claims even rarer than the marsh rabbit or the silver rice rat.

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[17] The exclusive jurisdiction of the Court of Federal Claims and the Federal Circuit over most takings cases against the federal government explains why the conflicting decisions discussed herein mainly come from state appellate courts.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDICES

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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97-5138

LLOYD A. GOOD, JR.,
*Plaintiff-Appellant,*
v.

UNITED STATES,
*Defendant-Appellee.*

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DECIDED: August 31, 1999

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Before NEWMAN, *Circuit Judge*, SMITH, *Senior Circuit Judge*, and GAJARSA, *Circuit Judge*.

SMITH, *Senior Circuit Judge*.

This is a regulatory takings case. Lloyd A. Good, Jr. sued the federal government on the basis that it effectively took his property without just compensation when the U.S. Army Corps of Engineers denied him permission to dredge and fill on land he owns in the Florida Keys. The U.S. Court of Federal Claims granted summary judgment to the United States. *Lloyd A. Good, Jr. v. United States*, 39 Fed. Cl. 81 (1997). We affirm.

## *Facts*

Lloyd A. Good, Jr. ("Good") and his mother purchased a forty-acre tract of undeveloped land on Lower Sugarloaf Key, Florida, in 1973,[1] as part of a much larger real estate purchase. The tract, known as Sugarloaf Shores, consists of thirty-two acres of wetlands (a combination of salt marsh and freshwater marsh) and eight acres of uplands. The sales contract for the land stated that:

> The Buyers recognize that certain of the lands covered by this contract may be below the mean high tide line and that as of today there are certain problems in connection with the obtaining of State and Federal permission for dredging and filling operations.

Good's efforts to develop the property began in 1980, when he hired Keycology, Inc., a land planning and development firm, to obtain the federal, state, and county permits necessary to develop Sugarloaf Shores into a residential subdivision. In their contract, Good and Keycology acknowledged that "obtaining said permits is at best difficult and by no means assured."

Good submitted his first permit application to the U.S. Army Corps of Engineers ("Corps") in March 1981. The Corps permit was required for dredging and filling navigable waters of the United States, including wetlands adjacent to navigable waters, under the Rivers and Harbors Act of 1899 [2] and under § 404 of the Clean Water

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1 Good became the sole owner of the property on his mother's death in 1975.

2 33 U.S.C. § 403 (1994).

Act.[3] Good proposed filling 7.4 acres of salt marsh and excavating another 5.4 acres of salt marsh in order to create a 54-lot subdivision and a 48-slip marina. The Corps granted the requested permit in May 1983. Good modified the permit in response to county environmental concerns and the modified permit was issued January 6, 1984. Under both permits, the authorized work had to be completed within five years. *See* 33 CFR § 325.6 (1998).

Good and Keycology were also pursuing the required state and county permits. In February 1983, the state Department of Environmental Regulation issued a permit for the requested dredging and filling. The state permit was conditioned, however, on Good obtaining county approval for the project.

On May 10, 1983, Good applied for county approval of the dredge-and-fill proposal that had been approved by the federal and state permits. The county determined that the plan was a "major development" subject to a more stringent environmental review than under standard procedures. After Good appealed the "major development" determination, the County Commission ordered the county to process the permit application under standard review procedures. The county granted Good's permit on July 13, 1984.

At this point, Good had received federal, state, and county approval to develop the property. Florida law, however, presented one more hurdle, in the form of the Environmental Land and Water Management Act, FLA. STAT. ANN. §§ 380.012 to 380.12 (West 1997). The Act created a statutory regime for regulating development

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[3] Pub. L. No. 92-500 § 2, 86 Stat. 884 (Oct. 18, 1972), amending the Federal Water Pollution Control Act (codified as amended at 33 U.S.C. § 1344 (1994)).

in Areas of Critical State Concern, including the entire Florida Keys.[4] Under the Act, the Florida Department of Community Affairs ("DCA") reviews local land development orders in Areas of Critical State Concern and may appeal those orders to the Florida Land and Water Adjudicatory Commission ("FLAWAC").[5] *See* FLA. STAT. ANN. § 380.07 (West 1997). On September 10, 1984, the DCA appealed the county's approval of Good's dredge-and-fill project. FLAWAC held that the county had erred in subjecting Good's plan only to the standard review, and on May 29, 1986 ordered the county to review the project as a "major development."

Making matters worse for Good, the county in the meantime had adopted a new land use plan and new development regulations. The new regulations prohibited dredging to provide access to docks, prohibited filling of salt marsh for building sites, and limited filling of salt marsh to 10% of the salt marsh on a parcel. MONROE COUNTY, FLA. CODE, art. II, § 9.5-345 (1986). Since Good's plan involved dredging to provide boat access between the proposed marina and Upper Sugarloaf Sound, and required filling roughly 25% of the parcel's salt marsh to provide building sites, Good's project would not have been allowed under the new regulations.

Good filed suit in state court, alleging that the state had taken his property without just compensation and that FLAWAC's order was an unreasonable exercise of police

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4 The Keys were designated an Area of Critical State Concern in 1977. Although the Florida Supreme Court later held the Act's procedure for designating Areas of Critical State Concern to be unconstitutional, *see Askew v. Cross Key Waterways*, 372 So. 2d 913, 918 (Fla. 1978), the Florida Legislature formally so designated the Keys in the Florida Keys Protection Act of 1979, FLA. STAT. ANN. § 380.0552 (West 1997).

5 FLAWAC is composed of the Governor and Cabinet of the State of Florida. FLA. STAT. ANN. §§ 14.202, 380.07 (West 1997).

power. That suit was settled on October 22, 1987. The consent decree provided that Good's application would be evaluated under the repealed major development review standard but that any future development of Sugarloaf Shores would be subject to later-enacted land use regulations.

Good's efforts to get state and county approval for his project had used up most of the five-year time limit on the federal permits issued in 1983 and 1984. Good therefore requested that the Corps extend the time limits of the permits. The Corps denied Good's request to reissue the permits without changes, but granted a new permit allowing substantially the same development on October 17, 1988.

The county gave preliminary approval to Good's plan on November 9, 1989. Final county approval, however, was subject to fifteen conditions, the most significant of which was approval of the project by the South Florida Water Management District (SFWMD).

Good filed an application with SWFMD. A few months later, SFWMD notified Good that its staff recommended denying the application, based on "the unmitigated loss of wetlands, the loss of habitat for the endangered species within them [i.e., the state-listed mud turtle and Lower Keys marsh rabbit] and the lack of reasonable assurance that future unmitigated wetlands destruction will not occur due to the lack of the above-requested dedication." In view of this negative review, Good requested that his application be removed from SFWMD's agenda. He never reactivated the application or otherwise obtained SFWMD approval for his project.

Apparently despairing of ever obtaining approval for his 54-lot plan, Good submitted a new, scaled-down plan

to the Corps in July 1990. In his 1990 permit application, Good proposed building only sixteen homes, together with a canal and tennis court. Although the new plan greatly reduced the overall number of houses, it located all of them in the wetlands area. The overall wetlands loss, therefore, was only reduced from 10.53 acres to 10.17 acres.

Between the time the Corps issued Good's 1988 permit and the time he applied for the 1990 permit, the Lower Keys marsh rabbit was listed as an endangered species under the Endangered Species Act ("ESA"). *See* 16 U.S.C. § 1533 (1994); 55 Fed. Reg. 25,588 (June 21, 1990). The Corps was therefore required to consult with the Fish and Wildlife Service ("FWS") to insure that issuing the requested permit would not place the continued existence of the species in jeopardy. *See* 16 U.S.C. § 1536 (a)(2) (1994).

Under this so-called "section 7 consultation," FWS prepared a biological opinion as to whether the proposed permit would put the rabbit in jeopardy. In its biological opinion, issued February 19, 1991, FWS concluded that the project proposed in Good's 1990 permit application would not jeopardize the continued existence of the marsh rabbit. Nevertheless, it recommended denial of the permit based on the development's overall environmental impact.[6]

The FWS biological opinion also instructed the Corps to notify Good not to proceed under his 1988 permit. The 1988 permit had been issued before the marsh rabbit was listed as an endangered species and proposed a different project than the 1990 permit application. Therefore,

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[6] FWS made its recommendation pursuant to the Fish and Wildlife Coordination Act of 1934, 16 U.S.C. §§ 662-666 (1994). The Corps was not required to follow this recommendation.

the FWS "no jeopardy" finding did not apply to the earlier permit, and development pursuant to the 1988 permit could violate the ESA.

On May 14, 1991, the Corps notified FWS that Good intended to proceed with the project allowed by the 1988 permit. The Corps also noted that it did not believe the project would jeopardize the marsh rabbit, but noted that the silver rice rat had been listed as an endangered species subsequent to the FWS biological opinion on the 1990 permit application. *See* 56 Fed. Reg. 19,809 (April 30, 1991).

In response, FWS initiated consultation under the ESA and notified the Corps that it would prepare a new biological opinion evaluating the effect of Good's 1988 plan on both endangered species. On December 18, 1991, FWS released its new biological opinion, concluding that both the 1988 and 1990 plans jeopardized the continued existence of both the Lower Keys marsh rabbit and the silver rice rat.[7] FWS recommended that the Corps deny the 1990 application and modify the 1988 permit to include FWS's "reasonable and prudent alternatives," which included locating all homesites in upland areas and limiting water access to a single communal dock.

The Corps denied Good's 1990 permit application on March 17, 1994. At the same time, the Corps notified Good that his 1988 permit had expired. The Corps based its denial on the threat that either project posed to the endangered rat and rabbit.

*Proceedings in the Court of Federal Claims*

On July 11, 1994, Good filed suit, alleging that the Corps' denial of his permit worked an uncompensated

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[7] FWS had earlier concluded that the 1990 plan did not place the marsh rabbit in jeopardy, but changed its mind in view of information showing further decline in the marsh rabbit population.

taking in violation of the Fifth Amendment. On cross-motions for summary judgment, the Court of Federal Claims granted summary judgment in favor of the government. The court held that the Corps' denial of Good's permit did not constitute a "per se" taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), because the ESA did not require that the property be left in its natural state and because the government had shown that the property retained value, either for development or for sale of transferrable development rights (TDRs), after the permit denial. The court found that Good had not presented sufficient evidence to show a reasonable dispute over the value of the property and rejected Good's legal challenge to the use of TDRs in the value calculation.

The court also held that there had been no taking under the ad hoc analysis of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). The court held that Good lacked reasonable, investment-backed expectations since federal and state regulations imposed significant restrictions on his ability to develop his property both at the time he purchased it and at the time he began to develop it. Finding the lack of reasonable expectations determinative, the court held that no taking had occurred.

*Jurisdiction and Standard of Review*

This court has jurisdiction over an appeal from a final judgment of the Court of Federal Claims. *See* 28 U.S.C. § 1295(a)(3) (1994). We review a grant of summary judgment completely and independently, construing the facts in the light most favorable to the non-moving party. Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See State of Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997).

*Analysis*

The Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use, without just compensation." U.S. CONST. amend. V. The government can "take" private property by either physical invasion or regulatory imposition. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Lucas*, 505 U.S. 1003. Appellant in this case alleges a regulatory taking.

It has long been recognized that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The Supreme Court has set out "several factors that have particular significance" in determining whether a regulation effects a taking. *Penn Central*, 438 U.S. at 124. These factors are (1) the character of the government action, (2) the extent to which the regulation interferes with distinct, investment-backed expectations, and (3) the economic impact of the regulation. *See id. See also Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994); *Florida Rock Inds., Inc. v. United States*, 18 F.3d 1560, 1567 (Fed. Cir. 1994); *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994). Because we find the expectations factor dispositive, we will not further discuss the character of the government action or the economic impact of the regulation.

*Reasonable, Investment-backed Expectations*

For any regulatory takings claim to succeed, the claimant must show that the government's regulatory restraint interfered with his investment-backed expectations in a manner that requires the government to compensate him. *See Loveladies Harbor*, 28 F.3d at 1179. The require-

ment of investment-backed expectations "limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation." *Creppel*, 41 F.3d at 632. These expectations must be reasonable. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-1006 (1984).

Reasonable, investment-backed expectations are an element of every regulatory takings case. *See Loveladies Harbor*, 28 F.3d at 1179. *See also id.* at 1177 ("In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss. In economic terms, it could be said that the market had already discounted for the risk, so that a purchaser could not show a loss in his investment attributable to it."); *Creppel*, 41 F.3d at 632 ("One who buys with knowledge of a restraint assumes the risk of economic loss.").

Good argues that the Supreme Court has eliminated the requirement for reasonable, investment-backed expectations, at least in cases where the challenged regulation eliminates virtually all of the economic value of the landowner's property. In support, Appellant cites *Lucas*, 505 U.S. at 1015, and argues that *Loveladies Harbor* should be reversed as contrary to *Lucas*.

However, we agree with the *Loveladies Harbor* court that the Supreme Court in *Lucas* did not mean to eliminate the requirement for reasonable, investment-backed expectations to establish a taking. It is true that the Court in *Lucas* set out what it called a "categorical" taking "where regulation denies all economically beneficial or productive use of land." 505 U.S. at 1015. The *Lucas* Court, however, clarified that by "categorical" it meant those "categories of regulatory action [that are] compensable without case-specific inquiry *into the public interest*

*advanced in support of the restraint.*" *Id.* (emphasis added). A *Lucas*-type taking, therefore, is categorical only in the sense that the courts do not balance the importance of the public interest advanced by the regulation against the regulation's imposition on private property rights. *See Loveladies Harbor,* 28 F.3d at 1179.

The *Lucas* Court did not hold that the denial of all economically beneficial or productive use of land eliminates the requirement that the landowner have reasonable, investment-backed expectations of developing his land. In *Lucas,* there was no question of whether the plaintiff had satisfied that criterion. *See id.* at 1006-1007 ("In 1986, petitioner David H. Lucas paid $975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, S.C. Code Ann. § 48-39-250 *et seq.* (Supp. 1990), which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels.").

In addition, it is common sense that "[o]ne who buys with knowledge of a restraint assumes the risk of economic loss. In such a case, the owner presumably paid a discounted price for the property. Compensating him for a 'taking' would confer a windfall." *Creppel,* 41 F.3d at 632 (citations omitted).

Appellant alternatively argues that he *had* reasonable, investment-backed expectations of building a residential subdivision on his property. Appellant reasons that the permit requirements of the Rivers and Harbors Act and the Clean Water Act are irrelevant to his reasonable expectations at the time he purchased the subject property,

because he obtained the federal dredge-and-fill permits required by those acts three times, and was only denied a permit, based on the provisions of the Endangered Species Act ("ESA"), when two endangered species were found on his property. Therefore, since the ESA did not exist when he bought his land, he could not have expected to be denied a permit based on its provisions.

Appellant's position is not entirely unreasonable, but we must ultimately reject it. In view of the regulatory climate that existed when Appellant acquired the subject property, Appellant could not have had a reasonable expectation that he would obtain approval to fill ten acres of wetlands in order to develop the land.

In 1973, when Appellant purchased the subject land, federal law required that a permit be obtained from the Army Corps of Engineers in order to dredge or fill in wetlands adjacent to a navigable waterway. Even in 1973, the Corps had been considering environmental criteria in its permitting decisions for a number of years. *See Deltona Corp. v. United States*, 657 F.2d 1184, 1187 (Ct. Cl. 1981) ("[O]n December 18, 1968, in response to a growing national concern for environmental values and related federal legislation, the Corps [announced that it] would consider the following additional factors in reviewing permit applications: fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest."). *See also id.* at 1190 ("[S]ince the late 1960's the regulatory jurisdiction of the Army Corps of Engineers has substantially expanded pursuant to § 404 of the [Clean Water Act] and—under the spur of steadily evolving legislation—the Corps has greatly added to the substantive criteria governing the issuance of dredge and fill permits."). By 1973, the Corps had denied dredge-and-fill permits solely on environmental grounds. *See, e.g., Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970).

In addition to the federal regulations, development of the subject land required approval by both the state of Florida and Monroe County. See the discussion of Good's permit application process, *supra.*

At the time he bought the subject parcel, Appellant acknowledged both the necessity and the difficulty of obtaining regulatory approval. The sales contract specifically stated that "[t]he Buyers recognize that . . . as of today there are certain problems in connection with the obtaining of State and Federal permission for dredging and filing operations." Appellant thus had both constructive and actual knowledge that either state or federal regulations could ultimately prevent him from building on the property. Despite his knowledge of the difficult regulatory path ahead, Appellant took no steps to obtain the required regulatory approval for seven years.

During this period, public concern about the environment resulted in numerous laws and regulations affecting land development. For example:

- In December 1973, the Endangered Species Act was enacted. 16 U.S.C. § 1531 et seq. (1994). The ESA prohibited federal actions that would be "likely to jeopardize the continued existence of any endangered species," 16 U.S.C. § 1536(a)(2), and made it unlawful to "take" (i.e., kill, harass, etc.) any endangered animal. *See* 16 U.S.C. §§ 1532(19), 1538(a)(1)(B).

- In 1975, the Corps of Engineers issued regulations broadening its interpretation of its § 404 authority to regulate dredging and filling in wetlands. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 123-124 (1985). In 1977, the Corps further broadened its definition of wetlands subject to § 404's permit requirements. *See id.*

- Also in 1977, Florida enacted its own Endangered and Threatened Species Act, FLA. STAT. ANN. § 372.072 (West 1997), further emphasizing the public concern for Florida's environment. In 1979, the Florida Keys Protection Act was enacted, designating the Keys an Area of Critical State Concern. FLA. STAT. ANN. § 380.0552 (West 1997).

Thus, rising environmental awareness translated into ever-tightening land use regulations. Surely Appellant was not oblivious to this trend.

The picture emerges, then, of Appellant in 1973 acknowledging the difficulty of obtaining approval for his project, then waiting seven years, watching as the applicable regulations got more stringent, before taking any steps to obtain the required approval. When in 1980 he finally retained a land development firm to seek the required permits, he acknowledged that "obtaining said permits is at best difficult and by no means assured."

While Appellant's prolonged inaction does not bar his takings claim, it reduces his ability to fairly claim surprise when his permit application was denied. Appellant was aware at the time of purchase of the need for regulatory approval to develop his land. He must also be presumed to have been aware of the greater general concern for environmental matters during the period of 1973 to 1980. As our predecessor court stated on similar facts: "[W]hen Deltona acquired the property in 1964, it knew that the development it contemplated could take place only if it obtained the necessary permits from the Corps of Engineers. Although at that time Deltona had every reason to believe that those permits would be forthcoming when it subsequently sought them, it also must have been aware that the standards and conditions governing the issuance of permits could change. Deltona had no assur-

ance that the permits would issue, but only an expectation." *Deltona*, 657 F.2d at 1193.

Here, as in *Deltona*, Appellant "must have been aware that the standards and conditions governing the issuance of permits could change." *Id.* In light of the growing consciousness of and sensitivity toward environmental issues, Appellant must also have been aware that standards could change to his detriment, and that regulatory approval could become harder to get.

We therefore conclude that Appellant lacked a reasonable, investment-backed expectation that he would obtain the regulatory approval needed to develop the property at issue here. We have previously held that the government is entitled to summary judgment on a regulatory takings claim where the plaintiffs lacked reasonable, investment-backed expectations, even where the challenged government action "substantially reduc[ed] the value of plaintiffs' property." *Avenal v. United States*, 100 F.3d 933, 937 (Fed. Cir. 1996). Here, too, Appellant's lack of reasonable, investment-backed expectations defeats his takings claim as a matter of law.

*Conclusion*

Appellant lacked the reasonable, investment-backed expectations that are necessary to establish that a government action effects a regulatory taking. Therefore, we affirm the grant of summary judgment to the United States.

AFFIRMED.

**APPENDIX B**

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

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No. 94-442L

(Filed August 22, 1997)

LLOYD A. GOOD, JR.,
*Plaintiff,*

v.

THE UNITED STATES,
*Defendant.*

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OPINION

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MEROW, *Judge.*

Plaintiff Lloyd A. Good Jr. alleges that the U.S. Army Corps of Engineers ("Corps") denial of his 1990 permit application to dredge and fill wetlands and access navigable waters gave rise to a taking under the Fifth Amendment of the U.S. Constitution entitling him to $2,500,000.00 in just compensation. This matter is now before the court on cross-motions for summary judgment on liability. The principal issues raised in those motions is whether the federal denial deprived plaintiff's property of all economic value and, if not, whether that denial interfered with reasonable investment-backed expectations.

Plaintiff claims that the Corps denial of his 1990 permit application pursuant to the Endangered Species Act

("ESA") of 1973, 16 U.S.C. §§ 1531-1543 (1994), deprived his property of all economic value, and that his claim therefore falls squarely within the *per se* takings rule of *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). Plaintiff advances two main arguments in support of this *Lucas* claim. First, plaintiff maintains that even if development would not violate the ESA, development pursuant to U.S. Fish and Wildlife Service ("FWS") recommendations would not be economically viable, and therefore has the same effect as an outright prohibition on development.

Plaintiff argues in the alternative that even if his claim does not fall within the *Lucas per se* rule, he had reasonable investment-backed expectations in his development plans, and therefore can demonstrate a taking under *Penn Central Transportation Co. v. New York,* 438 U.S. 104 (1978).

Defendant contends that plaintiff's claim fails under the *Lucas* "antecedent inquiry" which requires that plaintiff demonstrate title to the right claimed to have been taken. In particular, defendant argues that plaintiff could not derive any economically viable use from his property without obtaining access to navigable waters of the United States. Defendant maintains that since the federal navigational servitude reserves that right to the federal government, the only economically relevant property interest at issue here belonged to the federal government, not the plaintiff. Defendant also maintains that plaintiff's claim fails under this inquiry because he did not acquire a vested right in his development plans under Florida law.

Defendant argues in the alternative that the federal restrictions do not have any effect on the value of plaintiff's property because plaintiff cannot show a "reasonable probability" that such development would be permitted

under state and county law. Thus, defendant concludes, plaintiff can neither demonstrate that the federal denial caused any economic impact, nor frustrated reasonable investment-backed expectations under *Penn Central.*

It is decided that no taking occurred in this case. As discussed more fully below, although plaintiff has a property interest that is the proper subject of a takings claim, that claim does not fall within the *Lucas per se* rule. Contrary to plaintiff's contention, the ESA does not require that his property be left in its natural state. Further, the FWS restrictions on development imposed pursuant to the ESA do not deprive plaintiff's property of all economic value. The property retains value both for development, or for the sale of transferable development rights.

Plaintiff's claim also fails under *Penn Central* because the Corps denial did not interfere with reasonable investment-backed expectations. At the time of plaintiff's initial 1973 investment in his property, both the federal and state regulatory regimes at issue here imposed significant development restrictions on plaintiff's use of that property. Although plaintiff would otherwise be constructively charged with knowledge of those restrictions, plaintiff explicitly acknowledged those restrictions, and their potential to thwart development, in his contract for the purchase of the property. Later, when plaintiff began to invest in preparing the property for development in 1980, the regulatory regime had been further strengthened. Again, plaintiff acknowledged those restrictions, and their potential to thwart development, in the contract making his first major investment in that development.

Land development at both points in time was a highly regulated business, and plaintiff's sought uses for his property were subject to restriction or prohibition under this

regulatory regime. While plaintiff was free to assume the investment risks involved after considering that regime, the Fifth Amendment does not require the federal government to act as his surety should that investment prove to be ill-taken. Accordingly, defendant's motion for summary judgment is granted. Plaintiff's motion for summary judgment is denied.

## FACTS

"Sugarloaf Shores," the 40 acre property at issue in this case, is located on Lower Sugarloaf Key, Monroe County ("the county"), Florida. Approximately half of the county hosts a portion of Everglades National Park, established in 1947 to protect the marshes of the Everglades. The remaining half of the county consists of the Florida Keys, a string of islands off the southern tip of Florida designated in 1979 as a state area of critical environmental concern. Lower Sugarloaf Key is located approximately 15 miles northeast of Key West, the county seat and the employment center of the Keys.

Sugarloaf Shores consists of a total of 32 acres of wetlands, approximately 26 acres of which are locally rare salt marsh fringed with mangrove trees and 6 acres of which are freshwater sawgrass marsh.[1] These salt and freshwater wetlands are separated by 8 acres of upland located in the southwest corner of the property. Much of the property is periodically submerged by the tide from Upper Sugarloaf Sound, a navigable water of the United States and an Outstanding Florida Water. The property provides habitat for several endangered species, including

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[1] "The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3(b) (1996).

the Lower Keys marsh rabbit, the mud turtle and the silver rice rat.

On April 18, 1973, plaintiff entered into a contract to purchase Sugarloaf Shores and several other properties on Lower Sugarloaf Key and nearby Saddlebunch Key. In that contract, plaintiff acknowledged that:

> The Buyers recognize that certain of the lands covered by this Contract may be below the mean high tide line and that as of today there are certain problems in connection with the obtaining of State and Federal permission for dredging and filling operations.

Plf. Summ. J. Ex. 1 at 7. On October 8, 1973, plaintiff acquired Sugarloaf Shores and these other properties for a total cost of $2 million.[2] Plaintiff estimates that his basis in Sugarloaf Shores is $92,718.78, and alleges that he has spent approximately this amount in his effort to develop the property. The record reveals that the bulk of this investment took place after 1980.[3] Plf. Summ. J. Ex. 4.

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2 Plaintiff and his mother acquired Sugarloaf Shores together with a nearby motel area and marina known as Sugarloaf Lodge, parcels adjacent to the motel, additional parcels on Lower Sugarloaf Key, as well as property on Saddlebunch Key, which was subsequently developed as a recreational vehicle park. Plaintiff inherited his mother's 30% interest in Sugarloaf Shores, together with her interest in these other properties, upon her death in 1975.

Photographs of Sugarloaf Shores presented at a hearing before this court on November 20, 1996, revealed that none of the other properties involved in the 1973 transaction were adjacent to Sugarloaf Shores. Defendant has not contended that these other properties should be considered in this takings claim.

3 Plaintiff claims $3,800.00 in expenditures for the purchase fill and consulting services prior to 1974, but has only provided docu-

In October 1980, plaintiff hired Keycology, a land planning and development firm, to obtain the county, state and federal permits necessary to proceed with the development of Sugarloaf Shores. According to that agreement, plaintiff sought to obtain the permits necessary to prepare the property for development, and then sell the property to another party for actual development.[4]

The agreement specifically provided that Keycology would be paid a fixed fee of $24,000.00 for its good faith effort to obtain those permits within two years, and an additional fee should those permits issue. The agreement further provided that the additional fee would be equal to one-third of the value that Sugarloaf Shores was increased above its undeveloped value. Plaintiff and Keycology set that undeveloped value at $350,000.00, and acknowledged that the property would be worth much more if the necessary permits for development could be obtained. Although Sugarloaf Shores was zoned for single family residential use and platted for a 76-lot development with canals, plaintiff and Keycology acknowledged that "obtaining said permits is at best difficult and by no means assured. . . ." Def. Summ. J. Ex. 33.

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mentation for $2,900.00 of these expenditures. Between 1982 and 1990, plaintiff claims $60,743.70 in expenditures for consulting services and permits, but has only provided documentation for $56,439.48. Plaintiff also claims $36,013.25 in legal fees, real estate taxes and mortgage interest for the period from 1973 to 1994.

[4] In July 1989, plaintiff contracted to sell Sugarloaf Shores to Patch Communications for $1,000,000.00. The deal was made expressly contingent upon plaintiff's ability to secure final major development approval from the county for improvements to Sugarloaf Shores. This agreement was canceled by its own terms a year later when plaintiff failed to obtain that approval within the time limit provided for in the contract. Plf. Summ. J. Ex. 53.

*1. Early Federal Permits*

Plaintiff, through Keycology, submitted his first permit application to the Corps in March 1981, as required by the Rivers and Harbors Act ("RHA") of 1899, 33 U.S.C. § 403 (1994), and the Clean Water Act ("CWA") of 1972, 33 U.S.C. § 1344 (1994), for the dredging and filling of navigable waters of the United States.[5] That permit was granted by the Corps in May 1983, and authorized plaintiff to fill approximately 7.4 acres of salt marsh and excavate another 5.4 acres of salt marsh.[6] In effect, the permit provided plaintiff with the federal authorizations necessary for his plan to prepare Sugarloaf Shores for a 54-lot residential subdivision, complete with a 48-slip marina providing deep water access to Upper Sugarloaf Sound. Based upon the environmental concerns of the county, plaintiff subsequently requested permission from the Corps to modify this permit. The Corps processed this request as a new permit, and issued that permit on January 6, 1984.[7]

Consistent with Corps regulations, both of these permits required that the work authorized by the permit be completed within five years. *See* 33 C.F.R. § 325.6 (1996). As those deadlines approached, however, plaintiff continued to experience difficulty obtaining the required state and county authorizations for his plan. In response to plaintiff's request that it extend his federal permits based upon these difficulties, the Corps gave the plaintiff two limited extensions while it considered whether plaintiff's 1983 and 1984 permits should be extended without change. The extensions maintained the validity of those

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5 For work requiring a permit under both the RHA and the CWA, Corps regulations provide for the filing of a single permit application. 33 C.F.R. pt. 325, Appendix A.

6 Permit No. 81J-1101.

7 Permit No. 83G-2076.

permits, but prohibited plaintiff from commencing work until the Corps finished its evaluation.[8]

In the interval between the issuance of plaintiff's original permits and his request to modify those permits as the five year deadline approached, the Corps had revised its regulations to clarify environmental review standards and explicitly recognize the value of rare wetland types. *See, e.g.*, Final Regulations for Controlling Certain Activities in Waters of the United States, 49 Fed. Reg. 39,478 (1984) (clarifying import of environmental permit review standards); Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206 (1986) (impacts to rare local wetland types should be avoided). Based upon these changes, the Corps exercised its authority to deny plaintiff's request to reissue his existing permits without change,[9] and instead processed his request as a new permit application.

The Corps granted plaintiff a new permit on October 17, 1988.[10] While authorizing plaintiff to prepare Sugar-

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[8] Although plaintiff repeatedly characterizes the Corps treatment of his extension and modification requests as unreasonable, the record does not support this characterization. In his own correspondence with the Corps, plaintiff notes that these requests were based upon his inability to obtain the necessary state and county authorizations during the five year life of the federal permits. Plf. Summ. J. Ex. 46. Although the Corps had no legal obligation to grant those requests, *see* 33 C.F.R. § 325.6(d), it timely granted two extensions to plaintiff while it conducted the review required of it by law.

[9] The regulations provide the Corps with the authority to modify, revoke or suspend any permit based upon, among other things, a change in circumstances, any objections to the activity authorized by the permit which were not considered previously, any changes in the statutory or regulatory authorities and the extent of investment the permittee has taken in reliance upon the permit. 33 C.F.R. § 325.7(a).

[10] Permit No. 87IPV-20805.

loaf Shores for substantially the same development plan called for in his original proposal, it limited the fill for residences built in the salt marsh to 40 by 40 foot building pads. This modification reduced the overall wetland losses of plaintiff's proposal from 12.8 acres to 10.53 acres. The permit was set to expire on October 17, 1993.

*II. State and County Permits*

At the same time that Keycology initiated the application process with the Corps, it began to pursue the state and county authorizations necessary to effect plaintiff's plan. This effort resulted in the issuance of a state dredge and fill permit on February 10, 1983. The commencement of work authorized by that state permit, however, was conditioned upon plaintiff obtaining the necessary county approvals.

On May 10, 1983, plaintiff sought county approval of the dredge and fill proposal approved by the federal and state permits. Upon reviewing plaintiff's plan, the county determined the plan was a "major development" under the county land use statute then in effect, and accordingly ordered that it be evaluated pursuant to that statute's "major development review" process. *See* Monroe County Code, Fla. ("MCC") ch. 6, art. VII (1985) (superseded 1986). This process required, among other things, a more regirous environmental review than that required by the standard development approval procedure. *See, e.g.*, MCC § 6-223(c)(1) (purpose of major development review to ensure development proceeds in harmony with natural ecology and environmental resources of county), § 6-225 (requiring the submission of an environmental designation survey of property proposed for development), § 6-229 (requiring the submission of a community impact statement detailing the impact of development on public services and environmental quality).

At the time that plaintiff sought county development approval, however, a moratorium on the issuance of major development approvals was in effect.[11] Although plaintiff's proposal was a "major development," [12] he appealed this determination to the Monroe County Board of Adjustment. After the Board of Adjustment refused plaintiff's request to have his proposal processed pursuant to standard development review, plaintiff appealed to the Monroe County Commission. Without providing a rationale, the County Commission reversed the decision of the Board of Adjustment, and ordered the county to process plaintiff's dredge and fill application according to the standard review procedures.

Processing plaintiff's proposal according to these standard procedures, the county granted plaintiff a dredge and fill permit on July 13, 1984. On September 7, 1984, the county also granted plaintiff's application to amend the plat of Sugarloaf Shores to comport with the federal and state permits that had already been issued.

On September 10, 1984, the Florida Department of Community Affairs ("DCA") appealed both of these approvals to the Florida Land and Water Adjudicatory

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[11] Moratoria were instituted by the county beginning at least as early as February 1982, and were intended to ensure that county review of development plans not already in the major development review pipeline would be adjudged pursuant to the new county land use and public facilities plans then in preparation. Monroe County Ordinance No. 025-1983 (prohibiting the issuance of major development approvals except in limited circumstances and referencing prior moratoria). *See also* Monroe County Ordinance No. 015-1983.

[12] "A major development project shall be any existing and/or activity or use which reflects one or more of the following identified characteristics . . . (1) A subdivision as identified in the county plat filing ordinance and which contains five (5) acres or more land and/or water area." MCC § 622.

Commission ("FLAWAC").[13] Rejecting plaintiff's claim that he had a vested right under Florida law to pursue his development plan notwithstanding the requirements of the major review process, FLAWAC found that:

> In 1973, Lloyd Good was familiar with regulatory restrictions on the use of wetland areas. As a Philadelphia attorney, he had practiced in wetland areas in New Jersey . . . and . . . knew that the concept of deadend canals at that time was not feasible. He had decided to amend the original plat (and change the development plan) even before he purchased Sugarloaf Shores . . . because he believed that under existing environmental laws the platted deadend canals would not be permitted.

Def. Summ. J. Ex. 2. FLAWAC went on to hold that the county had erred when it failed to subject plaintiff's proposals to major development review, and ordered the county to evaluate plaintiff's proposals pursuant to that review process.[14] That order was entered on May 29, 1986.

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[13] The DCA is Florida's land use planning agency. Among other things, the DCA recommends geographic areas for designation as Areas of Critical State Concern, reviews local development orders in those areas, and may appeal those development orders. *See* Florida Environmental Land and Water Management Act of 1972, Fla. Stat. §§ 186.001-.911, 380.012-.12 (1983 & Supp. 1984).

[14] DCA appeals are first reviewed by a hearing officer of the Division of Administrative Hearings of the Florida Department of Administration, Fla. Stat. § 120.57(1) (1983), who is empowered to make recommended findings of fact and concluusions of law. FLAWAC, which consists of the Governor and the Cabinet of the State of Florida, considers those findings and conclusions in arriving at a final order. Fla. Stat. §§ 120.57(1), 380.07. FLAWAC's final order specifically adopted the hearing officer's findings of fact and conclusions of law. Def. Summ. J. Ex. 3.

While the DCA appeal was pending before FLAWAC, the county adopted a new comprehensive land use plan and new development regulations. Both the plan and regulations became effective July 29, 1986, two months after FLAWAC entered its order in the DCA appeal. While the major development statute established a procedurally rigorous environmental review, the new development authorities replaced procedure with substantive environmental standards of proscriptive import. The new authorities not only prohibited dredging to provide access for docking facilities, Monroe County 1986 Comprehensive Plan, Volume II at 205, but also prohibited the filling of salt marsh except where necessary to provide access to a parcel. Even fill for that purpose was limited to 10 percent of the overall salt marsh on a parcel. Monroe County Code, Fla. art. II § 9.5-345 (1986) ("land development regulations" or "LDRs").

All of plaintiff's different development proposals involved dredging to provide access to Upper Sugarloaf Sound, and the filling of salt marsh for the purpose of providing residential housing. Accordingly, because of the impact these new authorities would have on his development plans, it became critical for plaintiff to secure county review under the repealed major development statute. Claiming that he could not secure that review per FLAWAC's order, plaintiff filed suit in state court. In that suit, plaintiff alleged that the state had taken his property entitling him to just compensation, and that FLAWAC's order was an unreasonable exercise of police power which violated his due process rights.

Plaintiff settled the case by stipulation on October 22, 1987. The stipulation provided that plaintiff was entitled to have his applications for dredge and fill and plat amendments adjudged according to the repealed major develop-

ment review statute. The stipulation also provided, however, that plaintiff's "future development relative to Sugarloaf Shores . . . shall be governed by those provisions in effect as of the date of application for such future development." Plf. Summ. J. Ex. 41.

On June 23, 1989, plaintiff submitted his major development review application to the county, and received preliminary approval of his application on November 9, 1989. The major development review statute provided that this preliminary approval would lapse unless a proper final development review application were submitted within one year of the preliminary approval.[15] The preliminary approval notified plaintiff of several conditions he would be required to satisfy in order to secure final major development approval.[16] Among those conditions was the requirement that plaintiff obtain a surface water management permit from South Florida Water Management District ("SFWMD").

Plaintiff filed an application with SFWMD on November 13, 1989. On May 31, 1990, SFWMD notified plaintiff that its staff recommended denial of his applica-

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[15] The statute defined a final development plan as a development plan that "conforms substantially to an approved preliminary development plan including all special conditions attached to the preliminary development plan approval." MCC § 6-222 (1985). The county resolution providing plaintiff with preliminary development approval similarly notes that the county "will consider an application for final approval upon submission of a proper application and evidence that the conditions listed above have been met." Plf. Summ. J. Ex. 56.

[16] Most of the conditions prescribed measures that would lessen the environmental impact of plaintiff's plan. The conditions addressed, for example, the preservation of wetlands not directly affected by development, the protection of endangered wildlife, and the maintenance of existing mangrove trees. Monroe County Planning Commission Zoning Board, Resolution 18 (Nov. 9, 1989).

tion. SFWMD staff noted that plaintiff had declined to alter his plans to mitigate impacts to wetlands, and had declined to place deed restrictions and conservation easements on those wetlands that would not be directly impacted by development. The staff also noted that the property provided habitat for the Lower Keys marsh rabbit and the mud turtle, two state-listed endangered species. Based upon these considerations, the staff concluded that they could not:

> provide a favorable environmental review for this project due to the unmitigated loss of wetlands, the loss of habitat for the endangered species within them and the lack of reasonable assurance that future unmitigated wetlands destruction will not occur due to the lack of the above-requested dedication.

Def. Summ. J. Ex. 8A.

In the face of this negative review, plaintiff requested that his application be removed from SFWMD's agenda. On September 17, 1991, plaintiff requested that SFWMD indefinitely table his application while he pursued a new permit from the Corps. After that time, plaintiff never reactivated his application. He did not otherwise obtain SFWMD approval for any development plan for Sugarloaf Shores.

Although plaintiff's preliminary development plan approval expressly required him to obtain the SFWMD permit in order to secure final development approval, plaintiff filed for final development approval without the SFWMD permit on March 7, 1990. Plf. Summ. J. Ex. 58. In its review of his final development submission, the county planning staff noted that plaintiff had not met the SFWMD condition and several of the other conditions set forth in the preliminary development approval. Based

upon these inadequacies, the staff found that plaintiff's application was not a satisfactory final development submission, and did not therefore toll the one-year time limit plaintiff was required to meet in order to prevent his preliminary approval from becoming invalid. Plf. Summ. J. Ex. 65. Plaintiff filed for an extension of this time limit to maintain the validity of that preliminary approval.

While the county extended that time limit to May 9, 1991, plaintiff did not make any further application for final development approval. This failure caused plaintiff's preliminary development approval to lapse.[17] Accordingly, under the terms of his October 22, 1987 stipulation, plaintiff's future applications for development were subject to the law in effect at the time of application. The law at the time included the Monroe County 1986 Comprehensive Plan and its restriction on dredging, and the LDR restrictions on the filling of salt marsh.

*III. The 1990 Federal Permit Application*

On June 14, 1990, plaintiff informed the Corps that because of state and county concerns with his development plan he was exploring a new plan for Sugarloaf Shores, and requested a conference with Corps personnel. Plaintiff subsequently submitted a new application to the Corps that reflected plaintiff's new plan to build 16 single family residences all within wetlands, along with a boat canal and tennis court. Although plaintiff's 1990 plan reduced the density of residential development compared to his 1988 proposal, overall wetland losses were only reduced from 10.53 to 10.17 acres. And, although the marina was

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17 Although plaintiff implies throughout his filings with this court that he had obtained the necessary county approvals for his project, the record nonetheless clearly indicates that plaintiff did not obtain such approvals.

eliminated in the 1990 plan, plaintiff proposed to dredge a canal which would provide the residential lots with protected mooring and water access to Upper Sugarloaf Sound. The 1988 Corps permit was still valid at the time of plaintiff's 1990 application.

In the interval between the issuance of plaintiff's 1988 Corps permit and his application for the new permit in 1990, the Lower Keys marsh rabbit was listed as an endangered species under the ESA. 16 U.S.C. § 1533; Endangered and Threatened Wildlife and Plants; Endangered Status for the Lower Keys Rabbit, 55 Fed. Reg. 25,588 (June 21, 1990) (codified at 50 C.F.R. pt. 17).[18] The marsh rabbit was known to inhabit Sugarloaf Shores, and its listing as an endangered species placed obligations upon the Corps and the FWS in the 1990 permit review that they did not have when the earlier Corps permits were considered. In particular, the FWS took on a more significant role in the Corps permitting decision.

During the consideration of the early permit applications, the FWS played a limited role in the Corps permitting decision pursuant to the Fish and Wildlife Coordination Act ("FWCA") of 1934, 16 U.S.C. §§ 662-666 (1994). FWCA requires federal agencies proposing to alter any body of water to first consult with the FWS concerning the fish and wildlife impacts of the proposed action. 16 U.S.C. § 662(a). Although the agency engaged in the permitting action should give serious consideration to FWS recommendations, the agency is not required to follow those recommendations. *See, e.g., Sierra Club v. Alexander*, 484 F. Supp. 455 (N.D.N.Y. 1980) (Corps may issue wetlands permit in face of FWS

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[18] "The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range . . . ." 16 U.S.C. § 1532(6).

objection raised in the context of FWCA consultation), *aff'd*, 633 F.2d 206 (2d Cir. 1980).

By contrast with its FWCA role, the ESA guarantees the FWS greater influence over the ultimate permitting decision where an endangered species may be affected by the federal action, and guarantees that species much greater protection.[19] First, pursuant to section 9 of the ESA, the marsh rabbit's endangered status made it illegal to "take" (*e.g.*, kill, harm, harass) an individual marsh rabbit. 16 U.S.C. §§ 1532(19), 1538(a)(1)(B). This take prohibition applies to any person and any act that kills or injures endangered wildlife, including significant habitat modification which has this effect. 50 C.F.R. § 17.3 (1996); *see also Babbitt v. Sweet Home*, 515 U.S. 687 (1995). A person found to have knowingly violated this prohibition faces both civil and criminal penalties. 16 U.S.C. § 1540(a)-(b).[20]

Second, pursuant to section 7 of the ESA, the marsh rabbit's endangered status also obliged the Corps, after consulting with the FWS, to insure that the issuance of the wetlands permit would not place the continued existence of the species in jeopardy. The ESA consultation section specifically provides:

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[19] *See generally* Michael J. Bean, *The Evolution of National Wildlife Law* (1997).

[20] By permit, however, the FWS may allow an otherwise prohibited take to occur so long as "such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B). An applicant for a so-called "incidental take permit" must submit a conservation plan to the FWS delineating the steps that will be taken to minimize and mitigate impacts to the species. The permit application and conservation plan are subject to public comment, and may be revoked if the terms are not complied with by the applicant. *See* 16 U.S.C. § 1539(a)(2).

> Each federal agency shall, in consultation with and with the assistance of the . . . [FWS], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species . . . .

16 U.S.C. § 1536(a)(2). In the context of a section 7 consultation, the FWS will prepare a biological opinion to determine whether the federal action will cause jeopardy. The FWS will reach a jeopardy finding if it determines that the federal action "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02 (1996).

If the FWS reaches a jeopardy finding, it will attempt to develop reasonable and prudent alternatives ("RPAs" or "development alternatives") to the proposed plan that would avoid causing jeopardy. 16 U.S.C. § 1536(b)(3)(A).[21] If the FWS identifies development alternatives that would avoid jeopardy, but would nonetheless result in the take of one or more individuals of the species, the FWS may permit that take, effectively exempting the ac-

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[21] FWS regulations define RPAs as:

> alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director [of the FWS] believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

50 C.F.R. § 402.02

tion from section 9. 16 U.S.C. § 1536(b)(4), (*o*); 50 C.F.R. § 402.14(i)(5). Although the Corps retains the ultimate authority under the ESA to decide whether to require the applicant to modify his plans to comport with FWS RPAs, 50 C.F.R. § 402.15(a), the Corps must generally rely upon convincing evidence to reject those FWS determinations if it is to fulfill its ESA duty to insure that its permitting action will not cause jeopardy. *See Bennett v. Spear*, —— U.S. ——, 117 S. Ct. 1154, 1165 (1997).

On September 7, 1990, in its initial response to the Corps public notice of plaintiff's 1990 application, the FWS advised the Corps that plaintiff's property was inhabited by an endangered species, and proposed several conservation recommendations designed to protect the endangered rabbit. On October 9, 1990, in the face of the Corps determination that plaintiff's project would have no effect on the endangered rabbit and conflicting state information documenting the decline of the species, the FWS notified the Corps that it was initiating consultation under the ESA.

The FWS issued its biological opinion on February 19, 1991. In it, the FWS found that although the endangered rabbit had been in decline since the early 1980s, plaintiff's individual project would not be likely to jeopardize the continued existence of the species. The FWS did advise the Corps, however, that further species decline could trigger future restrictions on the issuance of wetlands permits. The FWS also advised the Corps that modifications to plaintiff's proposal or new information regarding endangered species could result in the reinitiation of ESA consultation.

Because the FWS reached a no jeopardy finding, it did not propose RPAs to plaintiff's 1990 development plan.

The FWS did, however, recommend denial of the 1990 application pursuant to its distinct responsibilities under FWCA. This FWCA recommendation was based upon the impact plaintiff's plan would have upon the fish and wildlife that utilized the salt marsh for habitat, and the effect that pollution from plaintiff's development would have upon the near shore waters of Upper Sugarloaf Sound. The Corps was not legally required to follow this recommendation.

The FWS biological opinion also instructed the Corps to notify the plaintiff that he should not commence work under his 1988 permit. Since the plaintiff's 1988 permit had been issued before the rabbit had been listed as an endangered species, and reflected a different development plan from plaintiff's 1990 proposal, the FWS reasoned that its no jeopardy finding would not necessarily be applicable to the 1988 permit. Accordingly, the commencement of work under the 1988 permit could potentially violate the ESA.

On May 14, 1991, the Corps notified the FWS that plaintiff intended to pursue the plan reflected in the 1988 Corps permit.[22] The Corps also expressed its opinion that the 54-lot residential development with marina authorized by the 1988 permit would not jeopardize the continued existence of the endangered rabbit. The Corps did note, however, that the silver rice rat had been listed as an endangered species after the FWS biological opinion was issued. Endangered and Theatened Wildlife and Plants; Endangered Status for the Lower Keys Population of the Rice Rat (Silver Rice Rat), 56 Fed. Reg. 19,809 (April 30, 1991) (codified at 50 C.F.R. pt. 17). Be-

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[22] Plaintiff still had not secured the required state and county approvals to proceed with the plan reflected in the Corps 1988 permit.

cause it did not have enough information about the silver rice rate, the Corps indicated that it did not know whether plaintiff's plan would have an effect on the species.

In response to this notification, the FWS initiated ESA consultation, and informed the Corps that it would prepare a new biological opinion evaluating the impact that plaintiff's 1988 plan would have on the endangered rabbit and rat. On December 18, 1991, the FWS released its new biological opinion. The new opinion evaluated the effect that both the 1988 and 1990 proposals would have upon the continued existence of both species.

In its earlier biological opinion on the endangered rabbit, the FWS no jeopardy determination noted that further species decline could trigger restrictions on development that would impact the endangered rabbit. In the interval between the issuance of this earlier biological opinion and the December 1991 opinion, new information showed that the species had declined in number. Further, other Lower Sugarloaf Key property owned by plaintiff, which he operated as a private airport, was burned. This fire may have destroyed occupied marsh rabbit habitat.

Although the FWS sought permission to evaluate both Sugarloaf Shores and plaintiff's airport property to determine the status of the species on those sites, plaintiff refused permission. The FWS ultimately concluded that plaintiff's 1988 and 1990 plans would cause jeopardy to the endangered rabbit based upon the new information showing species decline, and presuming that the fire on plaintiff's airport property would have exacerbated this decline. Further, the FWS found that both of those plans would place the continued existence of the silver rice rat in jeopardy. Based upon these findings, the FWS recommended that the Corps deny the 1990 permit application,

and modify the 1988 permit to reflect FWS RPAs.[23] These RPAs included restricting development to the upland portion of Sugarloaf Shores, limiting water access, and preventing the attraction of predators through deed and property maintenance restrictions.

Although FWS regulations exhibit a clear preference for receiving applicant input during the development of RPAs, 50 C.F.R. § 402.11(a)-(b), and provide the applicant with the right to review a draft of the biological opinion so that he may comment upon both the jeopardy determination and the proposed RPAs before they are finalized, 50 C.F.R. § 402.14(g)(5), plaintiff did not cooperate in this process.[24] *See also* Interagency Cooperation; Endan-

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[23] Plaintiff goes to some length to characterize the first FWS biological opinion recommending no development alternatives to his plan with its second biological opinion that did recommend development alternatives as inherently contradictory and suspect. Plaintiff, however, has failed to recognize that the first determination was made pursuant to FWCA, and that the second determination was made pursuant to the ESA.

As noted earlier, while the first FWS biological opinion found that plaintiff's plan would not jeopardize the existence of the endangered rabbit under the ESA, it did contain the FWCA recommendation to the Corps that plaintiff's application nonetheless be denied based upon broad fish and wildlife concerns. It was pursuant to FWCA and its mandate to consider all fish and wildlife resources that the FWS found that no development alternative to plaintiff's plan could mitigate those broad impacts.

The second FWS biological opinion finding jeopardy to both the endangered rabbit and rat due to new information, and suggesting development alternatives that would mitigate the impact of plaintiff's development plan solely upon these species, was made pursuant to the ESA. This ESA determination recommending development alternatives based upon particular species concerns was not inconsistent with the FWCA finding that no development alternatives could avoid the broader impacts on all fish and wildlife resources.

[24] It is not disputed that plaintiff made no such request, nor is it disputed that plaintiff refused to provide information and access

gered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19,926, 19,952 (June 3, 1986) ("Paragraph (g) provides for . . . applicant review of the basis for any finding contained in draft biological opinions, including the availability of reasonable and prudent alternatives.").

Rather, by March 13, 1992 letter, plaintiff indicated his opposition to implementing the RPAs, and submitted the report of his environmental consultant and mammalogist, Dr. Larry Brown, contesting the FWS jeopardy finding. In his two page report, Dr. Brown found that Sugarloaf Shores was not suitable habitat for the marsh rabbit, that march rabbits were flourishing on plaintiff's airport property, and that the silver rice rat was not found on Lower Sugarloaf Key. Dr. Brown took a position directly contrary to the FWS by concluding "[i]t is my professional opinion that development of the 40 acre project site will not jeopardize the continued existence of the Lower Keys marsh rabbit or silver rice rat in any way." [25]

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to his property to conduct site evaluations during the agency consultation process that culminated in the December 1991 opinion and the RPAs.

[25] It should be noted that, notwithstanding this finding, defendant's deposition of Dr. Brown revealed that he was not familiar with the meaning of the term "jeopardy" under the ESA:

> Q. Are you familiar with—Section Seven regulation promulgated by the Fish and Wildlife Service?
>
> A. No.
>
> Q. Then I take it you're not aware of the defined terms, then, set forth in those regulations?
>
> A. I'm not sure. What are the defining terms?
>
> Q. Well, in terms of 'jeopardy' or adverse effect. Are you familiar with the definitions in the regulations?
>
> A. Not the legal definitions. I have heard of those terms.

[Continued]

After receiving Dr. Brown's report, the Corps asked the FWS to reinitiate consultation to consider his findings. *See* 50 C.F.R. § 402.16(b). The FWS declined this request, restating its opinion that Sugarloaf Shores provided suitable habitat for the marsh rabbit and silver rice rat. Further, the FWS reasoned that, even assuming that the endangered rabbit was in fact flourishing on plaintiff's airport property, its jeopardy finding was still valid in light of new data showing further species population decline.

On March 17, 1994, the Corps denied plaintiff's 1990 application on endangered species grounds. The Corps also notified plaintiff that his 1988 permit had expired. In the denial letter, the Corps found that the RPAs were consistent with the project purpose in light of plaintiff's earlier plan to utilize upland to construct residential housing, that implementation of the RPAs would reduce wetland impacts generally, and that those RPAs would avoid causing jeopardy to the endangered rabbit and rat. Concurring in the FWS judgment, the Corps found that plaintiff's plan as proposed would jeopardize the continued existence of the endangered rabbit and rat, and therefore could not be authorized by the Corps under the ESA.

Plaintiff responded to the Corps denial by letter on May 27, 1994. In that letter, plaintiff newly asserted that *any* development of Sugarloaf Shores would violate the ESA. To support his position, plaintiff submitted a new report from Dr. Brown. In that two page report, Dr. Brown gave his opinion that the upland on Sugarloaf Shores "cannot be developed without violating the Endangered Species

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[25] [Continued]

Q. Do you understand there's a difference in meaning between 'jeopardy,' and 'adverse effect' under Section 7?

A. I wasn't aware of that.

Def. Summ. J. Ex. 117 at 55.

Act." Dr. Brown based this legal conclusion upon his view that all of Sugarloaf Shores was a "unit of natural habitat which is a functioning ecosystem, necessary for the continued survival of the Key's marsh rabbits which live on the site." [26]

On July 11, 1994, plaintiff filed this takings claim alleging, among other things, that the ESA required Sugarloaf Shores to be maintained in its natural state, thereby depriving the property of all economic value.

After plaintiff filed his takings claim, the Regional Solicitor for the U.S. Department of Interior asked the FWS to review the December 1991 biological opinion to determine whether development of Sugarloaf Shores consistent with the RPAs would still avoid jeopardy to the endangered rabbit and rat. The FWS responded that those RPAs were still viable, and that new information gathered since the December 1991 opinion indicated that additional RPAs might also be available.

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26 Although Dr. Brown concluded in his earlier March 1992 report that the development of Sugarloaf Shores would not cause jeopardy to the species, plaintiff also argued that the 1992 report nonethelesss supported his new contention that development *would* cause jeopardy. In particular, plaintiff extrapolated from Dr. Brown's 1992 finding that preserving the uplands would increase the survival prospects of the 2-3 individual marsh rabbits he estimated might occupy Sugarloaf Shores, that development of the uplands as suggested by the FWS would jeopardize the continued existence of the species. Plaintiff here confuses the commands of section 9 and section 7 of the ESA.

In particular, a finding that one or more individuals of the species would be taken within the meaning of section 9 does not require a jeopardy finding under section 7. Where an action complies with section 7 because it would not jeopardize the continued existence of the species, but would take individuals of the species, the FWS may effectively exempt that take from section 9 by permitting the take with mitigation. 16 U.S.C. § 1536(b)(4), (*o*); 50 C.F.R. § 402(14)(i)(5).

On January 19, 1995, the FWS released a draft of additional RPAs that would be available for Sugarloaf Shores. The additional RPAs included permitting the construction of 8 waterfront homes in salt marsh with permanent boat moorings. According to the FWS, the impact of this additional development would be offset by new performance measures that had recently been successfully employed by the FWS on other projects involving the conservation of small mammals in the context of residential development.

Defendant filed a motion to stay plaintiff's takings claim on February 17, 1995, because the Corps had vacated its 1990 permit denial based upon the FWS draft. The Corps notified plaintiff of this action, and solicited his participation in the evaluation of the RPAs. On March 2, 1995, plaintiff filed his opposition to defendant's motion for stay, arguing that he considered the reevaluation process to be beyond the authority of the Corps and the FWS. Plaintiff again took the position that any development of Sugarloaf Shores would violate the ESA. On May 10, 1995, the FWS formally released a new biological opinion containing the additional RPAs.

## SUMMARY AND JUDGMENT STANDARD

Both plaintiff and defendant have moved for summary judgment arguing that no genuine issues of material fact surround the resolution of this claim, and that judgment may therefore be entered as a matter of law. RCFC 56(c). Material facts are those which will significantly affect the outcome of a suit under the substantive law that governs the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In this case, since defendant's motion is granted, defendant is considered the moving party and plaintiff is considered the non-moving party.

The moving party bears the initial burden of demonstrating the absence of all genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In the case where the non-moving party bears the burden of proof at trial, the moving party can meet its initial burden by showing that there is an absence of evidence in the record necessary to prove an element of the non-moving party's case. *See id.* at 323. Once the moving party has made a sufficient showing, the burden shifts to the non-moving party to present facts evidencing a reasonable dispute to any material factual issue. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). While a material factual dispute must be viewed in a light most favorable to the non-moving party, that party must nonetheless "do more than simply show that there is some metaphysical doubt as to the material facts" in order to defeat a motion for summary judgment. *Id.*

## ANALYSIS

The takings clause of the Fifth Amendment to the U.S. Constitution provides "[n]or shall private property be taken for public use without just compensation." U.S. Const. amend. V. Early interpretations of the takings clause limited its application to actual government seizures of private property, and claims that the clause applied to government regulation of the use of private property, even where a regulation caused a total or near total decline in economic value, were rejected on the theory that the right to use property is not absolute. *See, e.g., Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (ban on existing brickmaking operation to protect encroaching residential property owners causing substantial diminution in value not a taking); *Mugler v. Kansas*, 123 U.S. 1 (1896) (prohibition on sale of alcohol which rendered brewery worthless not a taking).

The Supreme Court first advanced the proposition that the takings clause might be invoked to require the award of compensation where a government regulation had such a severe impact on property as to approximate an actual government seizure in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). The Court did not set out an analytical framework for determining when a regulation in fact went so far as to require compensation, however, until its 1978 decision in *Penn Central*. There the Court identified three factors to consider in analyzing a regulatory takings claim: the character of the government action, the economic impact of the regulation, and the extent to which the regulation interferes with reasonable investment-backed expectations. *Penn Central*, 438 U.S. at 124; *see also Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 641-7 (1993). The Court added that these factors should be evaluated by "focusing on the uses the regulations permit," *Penn Central*, 438 U.S. at 131, and rejected as fallacious the "contention that a 'taking' must be found to have occurred whenever the land-use restriction may be characterized as imposing a 'servitude' on the claimant's parcel." *Id.* at 130 n.27.

Although the Court in *Penn Central* did not elevate the importance of any one factor above another, it would later explicitly carve out two circumstances under which a single factor alone might determine the outcome of a takings case, and would implicitly recognize a third. The Court announced the first "*per se* rule" in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982), finding that a New York law requiring landlords to permit the permanent installation of cable TV apparatus gave rise to a taking. According to the Court, because the character of a government regulation that authorizes a permanent physical occupation of property so

closely resembles an exercise of eminent domain, a taking should be found without reference to the other *Penn Central* factors.[27] *See also Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996); *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991).

The Court announced the second *per se* rule in *Lucas v. South Carolina Coastal Council*, finding that a regulation depriving property of all economic value would give rise to a taking without considering the other *Penn Central* factors. 505 U.S. at 1029. The Court qualified this rule, however, with the exception that a total loss of value would not trigger a taking if "the nature of the owner's estate shows that the proscribed use interests were not part of this title to begin with . . . ." *Id.* at 1027. This "antecedent inquiry" into limitations that inhere in the owner's title is made by reference to state property or nuisance law, *id.* at 1029, and federal law. *See id.* (federal navigational servitude).

Finally, although not characterized as a *per se* rule, in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984), the Supreme Court resolved a regulatory takings claim solely under the reasonable-investment backed expectation factor of the *Penn Central* test, this time to find no takings liability. In that case, Monsanto argued that amendments to federal law providing for the disclosure of trade secrets submitted in government pesticide registration was a taking of those secrets. The federal law in effect at the time Monsanto submitted the trade information was silent on the issue of disclosure. *Id.* at 1008.

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[27] The Court qualified this *per se* rule in *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987), finding that a regulation which authorizes a permanent physical occupation of property as a valid condition to obtaining a development permit would not fall within the *Loretto per se* rule.

Relying upon the highly regulated nature of the pesticide industry, the Court found that Monsanto did not have a reasonable investment-backed expectation that their property would be protected, and rejected the claim. *Id.* at 1013.

*I. Plaintiff's Property Interest*

As noted above, where a plaintiff is able to demonstrate that a government regulation totally deprives property of all economic value, a taking will be found unless the proscribed use interests inhere in the landowner's title. *Lucas*, 505 U.S. at 1027; *M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995). Defendant maintains that, even assuming plaintiff could show that the government limitations here caused such a total deprivation, those limitations inhere in plaintiff's title. In particular, defendant argues that plaintiff could not derive any economically viable use of his property without obtaining access to navigable waters of the United States. Defendant concludes that since the federal navigational servitude reserves that right to the federal government, all economically relevant limitations on plaintiff's use of Sugarloaf Shores inhere in his title, and are therefore not the proper subject of a takings claim. In the alternative, defendant asserts that limitations on the development of Sugarloaf Shores inhere in plaintiff's title because he failed to acquire a vested right in his development plans under Florida law.

*a. The Navigational Servitude*

The Commerce Clause, U.S. Const. art. 1, § 8, cl. 3, grants the federal government power and duty to regulate the navigable waters of the United States. This power has been interpreted as bestowing upon the federal government a dominant estate in navigable waters below the

mean high water mark ("MHWM") and the lands underlying them, *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R.*, 312 U.S. 592, 596 (1941); *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900); *Confederated Tribes of Colville Reservation v. United States*, 964 F.2d 1102, 1108 (Fed. Cir. 1992), and may be asserted by the government to protect the public interest in navigable waters. *See, e.g., United States v. Ashland Oil and Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974) (interests protected by servitude include protecting quality of navigable water).

This federal "navigable servitude" inheres in a private landowner's title, and subordinates his interests to those of the federal government. *See Lucas*, 505 U.S. at 1029; *M & J Coal*, 47 F.3d at 1153; *Owen v. United States*, 851 F.2d 1404, 1407 (Fed. Cir. 1988). This limitation imposed by the servitude has been applied to deny a regulatory takings claim where the federal government proscribes the dredging and filling of submerged lands below the MHWM. *Marks v. United States*, 34 Fed. Cl. 387, 403 (1995), *appeal docketed*, No. 96-5055 (Fed. Cir. 1996).[28]

[28] Although plaintiff claims that he did not propose to conduct activities below the MHWM, his 1990 Corps application clearly indicates that he proposed dredging below the MHWM. This activity would fall within the navigational servitude held by the United States, and could likely be prohibited without compensation due to that predominant federal interest. Plaintiff attempts to avoid this conclusion by arguing that dredging to provide boating access is a "passive" use which does not fall within the interests protected by the servitude, relying upon *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

In *Kaiser*, the Supreme Court found that the servitude would not defeat a takings claim where the government required public access to a private pond made navigable through private investment. The case turned upon the fact that the government sought to provide public access to a formerly private area, and the importance of the right to exclude others from private property. *Id.* at 179. It did not turn upon a determination that public access

and deprives a private landowner of land values derived from access to navigable waters. *U.S. v. Rands*, 389 U.S. 121, 123-7 (1967); *Owen*, 851 F.2d at 1410. Accordingly, defendant contends here that any value Sugarloaf Shores derives from access to Upper Sugarloaf Sound may not be attributed to plaintiff for the purposes of establishing takings liability.

Plaintiff responds with the argument that section 111 of the Rivers and Harbors Act abrogates the servitude and the *Rands* rule, and requires that such values be attributed to plaintiff. Section 111 provides:

> In all cases where real property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals, or waterways of the United States and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, the compensation to be paid for real property taken by the United States above the normal high water mark of navigable waters of the United States shall be the fair market value of such real property based upon all uses to which such real property may reasonably be put, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters.

33 U.S.C. § 595a (1994).

While section 111 modifies the *Rands* rule in some condemnation cases, the provision does not abrogate the navigational servitude generally, or provide compensation

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was a passive use of the navigable waters not within interests protected by the servitude. The Court acknowledged that the servitude could be applied to prohibit dredging without raising takings concerns. *Id.* at 180.

for economic impacts attributable to the *regulation* of navigable waters. *See United States v. 30.54 Acres of Land*, 90 F.3d 790, 796 (3d Cir. 1996) (dismissing regulatory taking counterclaim in condemnation case on ground that prohibition on existing use below the MHWM falls within navigational servitude). The legislative history of section 111 provides that it "makes no change in existing law" concerning the application of the navigational servitude. H.R. Rep. No. 1665, 91st Cong. 2d Sess. 31 (1970). Further, even if it were appropriate to apply section 111 in a regulatory context, the section would be inapplicable here because the federal limitations do not totally restrict plaintiff's use of Sugarloaf Shores. Section 111 provides that in cases of partial takings, no depreciation in the value of remaining real property shall be paid the landowner. *See* 33 U.S.C. § 595a.

Although defendant is correct that the navigational servitude reserves land values derived from proximity to navigable waters to the federal government, defendant has nonetheless failed to demonstrate that the servitude defeats plaintiff's takings claim. Defendant relies entirely upon plaintiff's deposition testimony, and the affidavit of his real estate agent stating that residential lots lacking water access would not be marketable, to support its argument that the servitude defeats this claim. More particularly, defendant extrapolates from this testimony that plaintiff has conceded that lack of water access would deprive Sugarloaf Shores of all economic value. It cannot be said that plaintiff's statements relate strictly to values reserved to the federal government pursuant to the navigational servitude. Accordingly, taking the facts most favorably for plaintiff, defendant has not shown that all economically relevant limitations on plaintiff's use of Sugarloaf Shores inhered in his title.

*b. Plaintiff's Property Interest under Florida Law*

Defendant argues in the alternative that even if plaintiff could demonstrate that the federal limitations caused a total loss of value, his taking claim would fail because he did not have a property right under Florida law to develop Sugarloaf Shores. For support, defendant points to the fact that plaintiff did not secure a vested right under state law in his development plan for Sugarloaf Shores. In the alternative, defendant argues that plaintiff had no property right in development because his property interest in Sugarloaf Shores was conditioned by state legislation regulating land use and dredge and fill activities.

Under Florida statutory and common law, a developer may obtain a vested right to pursue a particular development plan. A vested right may be acquired where the developer can show that he has: (1) substantially changed position, (2) in good faith reliance, (3) upon some act or omission of the government, such that it would be highly inequitable to destroy the acquired right. *Dade County v. United Resources*, 374 So. 2d 1046, 1050 (D.C.A. 3d Fla. 1979); Fla. Stat. Ann. § 380.06(20) (West 1988) (codifying vested rights procedure). Plaintiff did not acquire a vested right in his development plans for Sugarloaf Shores.[29]

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[29] Plaintiff's vested rights claim was rejected by FLAWAC in its May 29, 1986 order. Although plaintiff claims he filed a vested rights application with the county on August 8, 1985, the only evidence offered by plaintiff that such an application was ever filed is his affidavit and a vested rights application that does not bear evidence that it was even received. In any case, plaintiff does not produce any evidence that such application was approved, and thus that a vested right was granted. Plaintiff's implicit claim that he acquired a vested right by virtue of the zoning in place at the time of purchase is also without merit. *See City of Miami Beach v. 8701 Collins Ave.*, 77 So. 2d 428, 430 (Fla. 1954).

Contrary to defendant's contention, however, the presence or absence of a vested right in a given development scheme is not determinative of a takings claim. The failure of plaintiff to have secured such a vested right simply demonstrates that he has not secured a right to pursue a particular plan. It does not by itself mean that plaintiff has no right to pursue development. Similarly, even if plaintiff were able to demonstrate the existence of such a vested right under state law, a federal restriction on that state right would not demonstrate the federal restriction to be a taking. *See, e.g., Corn v. City of Lauderdale Lakes,* 95 F.3d 1066, 1073 (11th Cir. 1996) (denial of permission to build project to which developer holds vested right does not by itself establish takings liability).

Defendant argues in the alternative that state legislation regulating land use and dredge and fill activities deprives plaintiff of any property right in development. Defendant has not demonstrated, however, that the limitations at issue here and reflected in this state legislation have their origin in the background principles of Florida's nuisance and property law. *See Lucas,* 505 U.S. at 1029 (regulations that deprive property of all economic value cannot be newly legislated without compensation but must originate in background principles of the state property or nuisance law).[30]

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[30] It should be noted, however, that the Florida Supreme Court has held that a landowner has " 'no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which [injures] the rights of others.' " *Graham v. Estuary Properties Inc.,* 399 So. 2d 1374 (Fla. 1981) (quoting *Just v. Marinette County,* 201 N.W.2d 761, 768 (1972)), *cert. denied sub nom., Taylor v. Graham,* 454 U.S. 1083 (1981). While *Graham* establishes a common law basis for limitations on wetland destruction, the scope of those limitations under Florida common law are somewhat un-

## *II.* Lucas Per Se *Taking*

Where a plaintiff can demonstrate that the restriction at issue does not inhere in his title and totally deprives property of all economic value, he is entitled to judgment under the *per se* takings rule of *Lucas*. In support of his *Lucas* claim, plaintiff argues that the ESA requires him to maintain Sugarloaf Shores in its natural state, and that this requirement deprives the property of all economic value. In the alternative, plaintiff argues that even if the development of Sugarloaf Shores pursuant to the FWS RPAs would not violate the ESA, such development is not economically viable, and therefore has the same effect as an outright prohibition on use. Plaintiff has failed to establish either proposition. The ESA does not require plaintiff to maintain Sugarloaf Shores in its natural state, and the FWS restrictions imposed on development pursuant to the ESA do not deprive the property of all economic value.

### *a. Legal Requirements of the ESA*

Plaintiff's *Lucas per se* takings claim that the ESA requires Sugarloaf Shores to be maintained in its natural state is based upon two erroneous legal conclusions drawn from the FWS finding that Sugarloaf Shores provides habitat for the marsh rabbit,[31] and his consultant's finding

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clear. The reference in *Lucas* to state common law rules of property and nuisance has provoked new scholarly interest in divining the scope of those limitations. *See generally* Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 Stan. Envtl. L. J. 247 (1996) (describing the significant restrictions on wetland destruction at English common law).

[31] Plaintiff repeatedly refers to the FWS December 1991 biological opinion as "designating" Sugarloaf Shores as habitat for the marsh rabbit. This characterization creates the false impression that Sugarloaf Shores had acquired special legal status under

that development would result in the take of individual marsh rabbits. More particularly, plaintiff maintains that these findings demonstrate that development would violate the section 9 take prohibition, and cause jeopardy to the species under section 7. Accordingly, plaintiff concludes, he must maintain Sugarloaf Shores in its natural state in order to avoid violating these provisions of the ESA.

Neither legal conclusion is correct. First, the take of individual rabbits may be permitted under an exemption to the section 9 take prohibition. Second, the take of individual rabbits does not require a finding under section 7 that the species continued existence will be jeopardized.[32]

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the ESA. Under the ESA, the FWS is generally required to designate critical habitat at the same time the species is listed. 16 U.S.C. § 1533(b)(6)(C). "Critical habitat" are those areas that FWS determines possess the physical or biological features that are essential to the listed species conservation, and which need special management or protection to serve that function. 16 U.S.C. § 1532(5)(A). Where critical habitat has been designated, agency consultations must consider not only actions that might affect the listed species, but also actions that are likely to result in the destruction or adverse modification of this designated habitat. 16 U.S.C. § 1536(a)(2).

The FWS did not designate critical habitat for either the endangered rabbit or rat. 55 Fed. Reg. at 25,590 (endangered marsh rabbit), 56 Fed. Reg. at 19,813 (endangered silver rice rat). Accordingly, plaintiff's allusion to this designation is devoid of substance. Sugarloaf Shores was not so designated, and did not have this special status.

[32] In order to bring a takings claim before this court, plaintiff must concede the validity of the agency action that is the subject of his claim. This jurisdictional requirement stems from the fact that the "[t]he Tucker Act suit in the Claims Court is not . . . available to recover damages for *unauthorized* acts of government officials." *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 898 (Fed. Cir. 1986) (emphasis added), *cert. denied*, 479 U.S. 1053 (1987); *see also Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993). Defendant argues that this portion of plaintiff's *Lucas* claim is not within the court's jurisdiction, see 28

Plaintiff's first legal conclusion that the take of individual rabbits would be prohibited under the ESA fails to recognize the exemptions to that prohibition. Those exemptions were added to the Act in 1982 to resolve precisely the tension between section 7 and section 9 that plaintiff seizes upon to support his *Lucas* claim. As Congress explained in the legislative history to those amendments:

> Another concern raised by industry was that of resolving conflicts between Section 7 and Section 9. After complying with the rigorous demands of the Section 7 consultation process, the applicant or Federal agency receives no assurance that any incidental and unintentional takings contemplated under a Section 7 consultation will not be prosecuted under Section 9 which prohibits any taking. There are also situations where the unintentional taking may occur on private lands owned by a developer who has no need of a Federal permit or license to conduct their activities but, nevertheless, they are subject to the taking prohibitions of Section 9.

H.R. Rep. No. 97-567, at 15 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2815; *see also* H.R. Conf. Rep. No. 97-835, at 27, *reprinted in* 1982 U.S.C.C.A.N. 2860, 2868 (adopting the House provision).

In order to resolve this problem, Congress created two complimentary exemptions from the section 9 take prohibition:

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U.S.C. § 1491(a)(1), because it effectively challenges the scientific validity of the FWS determinations. In response, plaintiff concedes that this inquiry would be improper, and asserts that he does not challenge the validity of FWS scientific determinations, but rather the legal conclusions drawn from those determinations. In accord with plaintiff's concession, only the legal conclusions drawn from those FWS determinations were considered here.

> In order to meet these two different concerns, the Committee tailored two similar provisions. For the applicant who consults with the Secretary under the Section 7 process, the Secretary shall provide him with a written statement on what permissible incidental taking may occur. For private land owners, the Committee designed a solution through the permit provisions of Section 10 by authorizing the Secretary to issue permits to individuals who demonstrate that the taking of an endangered species will be incidental to, and not the purpose of, the lawful activity they will perform.

H.R. Rep. No. 97-567, at 15. Accordingly, the 1982 amendments to the ESA provided that the FWS may permit a take in the context of section 7 actions, 16 U.S.C. § 1536(b)(4), (*o*), and may permit a take in the private context. 16 U.S.C. § 1539(a). *See, e.g., Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 783 (9th Cir. 1995) (incidental take in private context); *Center for Marine Conservation v. Brown*, 917 F. Supp. 1128, 1147 (S.D. Tex. 1996) (incidental take in section 7 context).[33]

Plaintiff's second legal conclusion that the take of individual rabbits requires a jeopardy finding mistakenly

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[33] Accordingly, plaintiff's argument that development would expose him to civil or criminal prosecution by the FWS under the ESA is without merit. Any incidental take could be permitted by the FWS, and accordingly would not be a violation of the Act. Plaintiff misreads the ESA citizen suit provision when he argues that, even if the FWS would not bring such a suit, that a "bunny lover fan club" could do so. This provision only allows citizens, including the environmental groups of apparent concern to plaintiff, to sue for injunctive relief. 16 U.S.C. § 1540(g). While plaintiff may be correct that the prospect of such a suit would "dampen the enthusiasm of any landowner whose property is habitat of an endangered species," enthusiasm is not an interest protected by the takings clause.

equates the standards of section 7 and section 9. As noted earlier, jeopardy will be found where the issuance of the permit would "reasonably be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. While a take of individual endangered marsh rabbits under this definition could support a jeopardy finding if the take would appreciably reduce the likelihood of survival and recovery of the species, a take of individual rabbits does not *legally require* a finding of jeopardy under section 7. If plaintiff's interpretation were correct, the necessary predicate for the invocation of the ESA exemption for incidental takings, *i.e.*, that the take not cause jeopardy, *see* 16 U.S.C. § 1536(b)(4)(B); 50 C.F.R. § 402.14(i), would never be satisfied, rendering the exemption a nullity.

Here, the FWS found that plaintiff's 1988 and 1990 plans would jeopardize the continued existence of the endangered rabbit and rat, but that the implementation of RPAs would remove this jeopardy determination and allow development to proceed. Despite plaintiff's characterization of the ESA, the vast majority of development projects subject to jeopardy determinations do proceed in this way, allowing development to occur with modification.[34] The FWS also found that it was unlikely that implementation of the RPAs would result in the incidental

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[34] In its 1992 ESA review, the General Accounting Office found that from 1987 to 1992, nearly 90% of the small number of section 7 consultations that resulted in jeopardy findings prescribed reasonable and prudent alternatives that allowed development to proceed. General Accounting Office, *Endangered Species Act: Types and Number of Implementing Actions* (1992); *see generally* Oliver A. Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. Colo. L. Rev. 277 (1993).

take of individual rabbits, although as discussed above the agency was authorized to permit such a take. In sum, even if the development of Sugarloaf Shores consistent with the FWS RPAs would result in the take of individual rabbits on the property, the ESA does not legally require that the property be maintained in its natural state.[35]

b. *Estimating the Fair Market Value of Sugarloaf Shores*

Plaintiff argues in the alternative that even if the development of Sugarloaf Shores pursuant to the FWS RPAs would not violate the ESA, such development is not economically viable, and accordingly has the same effect as an outright denial. Defendant responds that plaintiff cannot establish that the federal restrictions have any effect on the value of Sugarloaf Shores because he cannot show a "reasonable probability" that such development would be permitted under state and county law in the absence of those federal restrictions. Evaluating the economic impact of a regulation in a takings claim requires a comparison of "the value that has been taken from the property with the value that remains in the property . . . ." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1986).

In order to conduct this evaluation here, several underlying issues must be resolved. First, the extent of development legally permissible under federal law must be known. The resolution of this issue here is complicated

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[35] The affidavits of a mortgage lender, commercial banker, real estate broker and developer submitted by plaintiff, each stating that the FWS finding that Sugarloaf Shores provided habitat for the endangered rabbit and rat left Sugarloaf Shores valueless, do not change this result. Defendant's depositions of each affiant revealed that none had any knowledge of the ESA exemptions or the role of RPAs, and that their common opinion was based upon misconceptions of the operation and requirements of the statute.

by a dispute concerning the proper characterization of the final decision in this case. Second, after the extent of development legally permissible under federal law is defined, the role of similar state and county restrictions in estimating the fair market value of Sugarloaf Shores must be determined. The resolution of both of these underlying issues reveals undisputed evidence that the federal restrictions do not deprive Sugarloaf Shores of all economic value. Accordingly, plaintiff's *Lucas per se* claim is rejected.

*i. Extent of Federal Restrictions*

Identifying the extent of development legally permitted on Sugarloaf Shores is a necessary prerequisite to evaluating the economic impact of the federal restrictions in this case. The importance of this inquiry is reflected in the ripeness doctrine which holds that a takings claim will not be heard if no such decision has been reached. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985); *Heck v. United States*, 37 Fed. Cl. 245, 250 (1997), *appeal docketed*, No. 97-5067 (Fed. Cir. 1997).[36] While defendant has not squarely raised the ripeness issue, the rationale underlying the ripeness rule which requires developers to seek approval for a less intensive development scheme after an initial denial requires a consideration of both the 1991 and 1995 FWS development alternatives in this case.

Plaintiff argues that the Corps denial together with the initial FWS RPAs were the final decision in this case, and that the additional RPAs should not be considered here. He maintains that this is the proper characterization of the final decision because he could not secure an ad-

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[36] *See generally* Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1 (1995).

ministrative appeal of that decision before bringing suit here.[37] While plaintiff is correct that he could not secure administrative review of the Corps denial, this does not bear upon whether the Corps denial finally defined the extent of development legally permitted on Sugarloaf Shores. Rather, plaintiff's observation bears on the question of whether he has exhausted administrative remedies. In *Williamson*, the Supreme Court explained the difference between these two doctrines:

> While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate . . . .

473 U.S. at 193. The question of whether plaintiff exhausted his administrative remedies would be an issue for consideration if plaintiff were challenging the validity of the Corps denial. In the instant suit, plaintiff concedes the validity of that action, *see supra* n.32, and accordingly exhaustion is not an issue here.

The finality of the Corps decision, however, is an issue properly considered here. While in the ordinary case,

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[37] Plaintiff's argument that defendant has conceded that the denial was the final decision is not supported by the record. In a hearing before this court and in written submissions, plaintiff contends that the Corps denial letter characterizes that denial as "final agency action." The denial letter does not contain this language. Plaintiff also erroneously asserts that defendant's answer and another Corps letter characterize the denial in this way. Hr'g Mot. to Stay Tr. at 64. Defendant has conceded only that the denial was final as to that particular application, and that development of Sugarloaf Shores under a different scheme was possible.

Corps denials will indicate that the decision is "final," this language by itself does not mean that the Corps would not consider a different application. Ripeness doctrine requires a court to look past this language to determine whether the Corps denial has actually defined the scope of development permitted under federal law. *Compare Heck*, 37 Fed. Cl. at 251 (takings claim unripe where wetland permit denial addressed procedural rather than substantive defect in permit application), *with City Nat'l Bank v. United States*, 30 Fed. Cl. 715, 720 (1994) (takings claim ripe where wetland permit denial indicated that permit applicant had "no possibility" of obtaining federal permit under any condition). Neither the Clean Water Act nor Corps regulations limit plaintiff's ability to submit a new application reflecting a different, less intensive plan.

In *Williamson* and *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), the Supreme Court considered the finality issue in the land development context. Relying upon *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981) (takings challenge to federal mining law unripe where plaintiff had not sought variance), the Court rejected takings claims brought by developers, after the first denial of a development plan, on ripeness grounds. In both cases, the Court required the developer to seek a variance from the denial or approval for a less intensive development plan before his takings claim could be heard.[38] Developers may be

[38] In *Loveladies Harbor v. United States*, 15 Cl. Ct. 381 (1988), the court dismissed the applicability of *Williamson* because neither the CWA nor Corps regulations provide for a "variance" procedure similar to the one involved in that case. *Id.* at 386-7. While it is true that neither so provide, this does not render *Williamson* inapposite. The rationale underlying that decision, and reflected again in *MacDonald*, is that if the statutory regime permits for reapplication, such reapplication must be made. *See, e.g., Southern*

relieved of this requirement, however, if able to demonstrate that such an effort would be futile. *See MacDonald*, 477 U.S. at 350 n.7; *Heck*, 37 Fed. Cl. at 252 (dismissing futility argument in wetland takings case noting that "a difficult position does not necessarily equal a futile position").

The Supreme Court recently reaffirmed the holdings of *Hodel, Williamson* and *MacDonald* in *Suitum v. Tahoe Regional Planning Agency*, —— U.S. ——, 117 S. Ct. 1659 (1997). Discussing those cases, the Court explained that "[t]hose precedents addressed the virtual impossibility of determining what development will be permitted on a particular lot of land when its use is subject to the decision of a regulatory body invested with great discretion, which it has not yet even been asked to exercise." *Id.* at 1667. Like the regional land use authority involved in *Suitum*, both the Corps and the FWS exercise significant discretion under the CWA and the ESA. Further, both agencies have exercised this discretion to institute regulatory mechanisms that allow for the accommodation of development when consistent with statutory mandates.[39]

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*Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir. 1990) (use of word "variance" in *Williamson* not talismanic; if other types of actions would provide relief, they must be pursued).

[39] *See, e.g.*, 33 C.F.R. § 320 (public interest balancing test for issuance of Corps wetlands permits); Final Notice of Issuance, Reissuance, and Modification of Nationwide Permits, 61 Fed. Reg. 65,874 (December 13, 1996) (exempting a half-acre or less of wetland loss for the construction of a single family home from CWA requirements); Endangered and Threatened Wildlife and Plants; Proposed Rule Exempting Certain Small Landowners and Low-Impact Activities From Endangered Species Act Requirements for Threatened Species, 60 Fed. Reg. 37,419 (July 20, 1995) (exempting 5 acres or less for residential housing from ESA threatened

By requiring developers to make a good faith effort to satisfy permitting agency concerns after an initial denial, ripeness doctrine reflects the reality that land development often involves a process of negotiation between the permitting agency and developer. As the Supreme Court recognized in *MacDonald*, "[l]and use planning is not an all-or-nothing proposition. A governmental entity is not required to permit a landowner to develop property to [the] full extent he might desire or be charged with an unconstitutional taking of the property . . . ." *MacDonald*, 477 U.S. at 347.[40]

Plaintiff here chose to take just such an all-or-nothing approach when faced with his first ever federal permit

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species requirements); John F. Turner, *The Endangered Species Act and Private Property: Conserving Endangered Species on Private Lands*, 32 Land & Water L. Rev. 571 (1997) (describing FWS landowner-friendly ESA initiatives).

[40] Many courts have applied the *MacDonald* rule. *See, e.g., Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84, 98 (2d Cir. 1992) (takings claim unripe where denial of land use application did not preclude submission of modified application); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1541 (11th Cir. 1991) (takings claim unripe where developer failed to pursue less intensive development scheme), *cert. denied*, 502 U.S. 810 (1991); *Villas of Lake Jackson, Ltd. v. Leon County*, 796 F. Supp. 1477, 1480 (N.D. Fla. 1992) (denial of multifamily development did not present ripe takings claim where no application made for single family development permitted by zoning statute); *Killington, Ltd. v. Vermont*, 668 A.2d 1278, 1283 (Vt. 1995) (takings claim unripe where permit denial contained mitigation measures that would satisfy endangered species concerns and allow for development); *Martin County v. Section 28 Partnership, Ltd.*, 676 So. 2d 532, 537 (D.C.A. 4th Fla. 1996) (alternative uses must be applied for and conclusively denied by regulatory body), *cert. denied*, —— U.S. ——, 117 S. Ct. 1553; *Tinnerman v. Palm Beach County*, 641 So. 2d 523, 525 (D.C.A. 4th Fla. 1994) (futility not established until developer has submitted one meaningful application for modification, variance, or less intensive use).

denial.[41] Rather than cooperating with the FWS as it developed RPAs, plaintiff instead chose to challenge its authority to engage in that process under the ESA. Applying the rationale underlying the ripeness doctrine, it is decided that both the 1991 and 1995 RPAs will be considered here in the absence of plaintiff's own good faith effort to make one reapplication.[42]

### *ii. The Effect of State and County Restrictions on the Fair Market Value of Sugarloaf Shores*

Based upon the extent of development legally permissible under federal law, the fair market value of the property in the absence of the FWS restrictions and the fair market value of the property in the presence of those restrictions must be estimated. Defendant argues that plaintiff cannot establish that the federal restrictions have any effect on the value of Sugarloaf Shores because he cannot show a "reasonable probability" that such development would be permitted under state and county law. More particularly, defendant maintains that uses which are not reasonably probable to occur should be excluded from the fair market value calculation. While state and local development restrictions are relevant in a federal

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[41] Plaintiff's 1990 modification was undertaken in order to meet state and county concerns, rather than federal concerns. Plaintiff was routinely granted federal permits for his plans up until the 1990 Corps application.

[42] In *Lucas*, the defendant argued that the plaintiff's takings claim was not ripe because he had not availed himself of a variance procedure instituted after the filing of his claim. 505 U.S. at 1011. The Supreme Court rejected the ripeness challenge, in part, on the prudential ground that it would "not accord with sound process" to require the plaintiff to avail himself a variance procedure that was not available to him prior to filing suit. *Id.* The same "sound process" considerations raised in *Lucas* are not implicated where, as here, the opportunity to pursue a variance or less-intensive development scheme was available before suit was filed.

takings case and may be considered in arriving at fair market value, defendant's argument that those restrictions may be relied upon here to serve as a total defense to plaintiff's *Lucas per se* claim is rejected.

The "reasonable probability" proposition advanced by defendant has its origins in eminent domain actions, and is applied in those actions as a guide to measure just compensation. Just compensation is, in most cases, set according to the fair market value of the property taken by the government. "Fair market value" is defined as the:

> most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.

American Institute of Real Estate Appraisers, *The Appraisal of Real Estate* 19 (9th ed. 1987). Fair market value is usually determined by reference to "highest and best use" of the property, which may be either the current use of the property at the time of the taking, or a use other than the existing use if the property is clearly adaptable to that use.

The Supreme Court established the standard to guide whether uses of property other than current uses should be considered in arriving at fair market value in *Olson v. United States*, 292 U.S. 246, 256 (1934). In *Olson*, the condemnee sought to have the fair market value of his property reflect its use as a reservoir. The Court rejected this argument, however, finding that the condemnee failed to show that there was a "reasonable possibility" that the

necessary lands and easements to could be acquired to effect that use where those lands were held by over a thousand different landowners, a foreign country and the United States. *Id.* at 255. In so ruling, the Court explained:

> Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value . . . .

*Id.* at 257; *see also Board of County Supervisors v. United States*, 116 F.3d 454, 457 (Fed. Cir. 1997) (valuation in eminent domain).

The *Olson* rule has been applied by analogy to regulatory takings claims to evaluate the economic impact of regulation, and it has raised at least two difficulties in the translation. First, the rule has been relied upon to reject the consideration of viable markets that do not involve a present use of land. Second, the rule has been relied upon to deprive a federal regulatory takings plaintiff any recovery where the use prohibited by the federal government would not have been permitted under a similar, though independent, state or local regulatory regime.[43] Both of these difficulties counsel against the application of the *Olson* rule as urged by defendant.

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[43] Plaintiff does not argue here that the state and county restrictions were mandated by the federal regulatory regime. Where the state has effected the alleged taking action under order of the federal government, liability will rest, if at all, with the federal government. *See Hendler v. United States*, 952 F.2d at 1379 (takings liability for the state installation of groundwater monitoring wells would properly rest with the federal government where the state acted under federal order).

The first difficulty is illustrated by the ongoing valuation dispute in the *Florida Rock* litigation. In *Florida Rock*, the Corps denied the plaintiff a federal permit to mine a large wetland west of suburban Miami. The plaintiff had the requisite state and local permits to engage in that use. Focusing solely upon whether there was an immediate economic use for the property, the court excluded evidence establishing value based upon a market of investors speculating that the federal prohibition would one day yield to development pressure from nearby Miami. Relying upon *Olson*, the court found that "[i]t is well established that speculative value may not be taken into account for purposes of determining compensation in condemnation proceedings . . . . It seems eminently sensible, as well as entirely fair, to apply the same rule in inverse condemnation cases." *Florida Rock Indus. v. United States*, 8 Cl. Ct. 160, 167-8 (1985) (*Florida Rock I*).

The Federal Circuit disagreed, finding that the court had misapplied the rule, and remanded the case. *Florida Rock*, 791 F.2d at 903 (*Florida Rock II*). The Federal Circuit explained:

> This rule . . . means that the court must not, itself, speculate, i.e., guess, about potential end uses or markets when the speculation is so remote or improbable that one would not invest his money in it. It does not exclude consideration of a relevant market made up of investors who are real but are speculating in whole or major part.

*Id.* After the court again rejected evidence of this market, *Florida Rock Indus. v. United States*, 21 Cl. Ct. 161, 172-73 (1990) (*Florida Rock III*), the Federal Circuit again remanded on this issue, strongly advising that "[a] speculative market may exist in land that is regulated as well as in land that is not, and the precise content of

regulations at any given time may not be particularly important to those active in the market." *Florida Rock Indus. v. United States,* 18 F.3d 1560, 1566 (Fed. Cir. 1994) (*Florida Rock IV*).

Adopting the proposition urged by defendant here that fair market value may not include uses impermissible under the state or county regulatory regime would exclude from consideration the possible existence of a market of investors speculating on a future development use for Sugarloaf Shores. The possibility that such a market could exist is evidenced by plaintiff's own representations relating to Sugarloaf Shores. In his 1980 contract with Keycology, for example, after acknowledging the dim prospects for obtaining the necessary permits to develop Sugarloaf Shores, plaintiff nonetheless speculated that the property had a worth of $350,000.00 in its undeveloped state without those permits. Def. Summ. J. Ex. 33.

Even were *Olson* carefully applied to ensure that the calculation of fair market value were not improperly restricted to present uses of property, however, it should still be rejected where it is relied upon as a total defense to a *Lucas* claim. This second difficulty with applying the *Olson* rule as urged by defendant was considered in *City National Bank v. United States,* 33 Fed. Cl. 759 (1995).

In *City National Bank,* the plaintiff sought to exclude evidence of a county land use law in determining the economic impact of a Corps action where the county law proscribed the same mining activity prohibited by the Corps. That evidence would only be excluded, it was ruled, if the plaintiff could demonstrate a "reasonable probability" that he could obtain the necessary county approvals to mine his property. *Id.* at 761. The plaintiff conceded he could not so demonstrate, and his takings

claim was dismissed on the ground that the Corps denial had no effect on the value of his property. *Id.* at 763.

The theory behind applying the *Olson* rule as above may be based, in part, upon the premise that it would be illogical to allow a takings plaintiff to establish liability based upon uses that would not later be considered in setting just compensation. This rationale, however, assumes that a court is bound to apply this rule in determining just compensation. The Supreme Court has held, however, that there is no set formula for arriving at the measure of just compensation:

> The Court in its construction of the constitutional provision has been careful not to reduce the concept of 'just compensation' to a formula. The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice. But the Amendment does not contain any definite standards of fairness by which the measure of 'just compensation' is to be determined. The Court in an endeavor to find working rules that will do substantial justice has adopted practical standards, including that of market value. But it has refused to make a fetish even of market value, since that may not be the best measure of value in some cases.

*United States v. Cors*, 337 U.S. 325, 332 (1949) (internal citations omitted).

To apply the *Olson* rule as a total defense to a *Lucas per se* claim would run contrary to the spirit of the Fifth Amendment. As this court has noted, "[a]ssuming that no economically viable use remains for the property, the Constitution could not countenance a circumstance in which there was no fifth amendment remedy merely because two government entities acting jointly or severally caused a taking." *Ciampetti v. United States*, 18 Cl. Ct.

548, 556 (1989). Accordingly, it is concluded that state and county restrictions at issue in this case may not validly be asserted to effect a total defense to a *Lucas per se* claim.

Importantly, however, this conclusion should not be construed to mean that state and local development restrictions have no bearing on the issue of federal takings liability. Those restrictions bear on liability in at least two ways. First, where state and local limitations are grounded in state nuisance or property law, those limitations must be considered in the *Lucas* antecedent inquiry into the nature of the owner's title. Second, state and local restrictions must be considered in determining the presence or absence of reasonable investment-backed expectations to engage in the proscribed use.

*iii. Economically Viable Uses Under Federal Law*

While the state and county restrictions at issue in this case will not be considered a total defense to federal takings liability, the question of whether Sugarloaf Shores retains economic value in light of the FWS restrictions remains. Since the burden of demonstrating no remaining economic value would rest with plaintiff at trial, defendant may meet its initial burden on this issue by demonstrating that there is an absence of evidence necessary to make this showing. If defendant meets that burden, the plaintiff must present facts evidencing a reasonable dispute exists on this issue. In support of its motion, defendant has submitted a professional appraisal report which demonstrates that Sugarloaf Shores retains economic value for development, or for the sale of transferable development rights under county law. Plaintiff has failed to present facts evidencing a reasonable dispute over either proposition.

The most reliable method of arriving at the fair market value of property, particularly unimproved property, is through the "sales comparison approach." That approach requires an appraiser to estimate fair market value based upon similar transactions in similar properties in the vicinity reasonably near the time of the alleged taking. Here, however, defendant's appraiser was unable to identify comparable sales of vacant, unimproved property. Due to this limitation, defendant's appraiser relied upon the "subdivision development method" in order to arrive at a fair market value for Sugarloaf Shores. Under this approach:

> All direct and indirect costs [of development] and entrepreneurial profit are deducted from an estimate of the anticipated gross sales price of the finished lots; the resultant net sales proceeds are then discounted to present value at a market-derived rate over the development absorption period to indicate the raw value of land.

The Appraisal Institute, *Dictionary of Real Estate Appraisal* 354 (3d ed. 1993). This approach toward valuation is generally disfavored on the ground that it is "highly speculative, prone to error, and reflects not so much the value as the highest price a developer can afford to pay for the land and still earn the desired profit." *Uniform Appraisal Standards for Federal Land Acquisition* A-8 (1992). Nonetheless it may be relied upon where no comparables of vacant unimproved land have been identified.

Unable to locate such comparables, defendant's licensed real estate appraiser, Theodore Slack, used the subdivision approach to estimate the fair market value of Sugarloaf Shores under two different assumptions. First, Mr. Slack estimated the fair market value of Sugarloaf Shores if the

necessary county, state and federal permits could be obtained to develop the property according to the plan reflected in plaintiff's 1990 Corps application. Based upon these assumptions, Mr. Slack estimated gross sales revenues at $3,200,000.00, and total sales expense, holding costs and profit at $1,549,135.00. Considering these projections, Mr. Slack found that an investment of $1,200,000.00 in Sugarloaf Shores would be feasible assuming a profit margin of 15% and a 14% yield on investment, and concluded that such yields would attract an investor under current market conditions.

Mr. Slack next estimated the fair market value of Sugarloaf Shores if the necessary state and county permits could be obtained to develop the property in accordance with all FWS development alternatives. Employing the same approach, Mr. Slack estimated gross sales revenues at $1,503,474.00, and total sales expense, holding costs and profit at $1,063,671.00. Considering these projections, Mr. Slack found that an investment of $80,000.00 in Sugarloaf Shores would be feasible based upon the same assumptions above. Finally, Mr. Slack estimated the fair market value of an active market for the sale of these rights. Mr. Slack found Sugarloaf Shores would have a fair market value of $110,000.00.[44]

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[44] Notwithstanding these findings, plaintiff erroneously claims that defendant has conceded that development according to the FWS RPAs is not economically viable. Plf. Mot. to Supp. at 2. In particular, plaintiff interprets defendant's statement that the economic viability of the FWS RPAs was mooted by Mr. Slack's finding that the RPAs do not represent the "highest and best use" of Sugarloaf Shores, Def. Reply at 11, as a concession that those RPAs are not economically viable. Contrary to this creative interpretation, it is clear that defendant's position is simply that at $110,000.00, transferable development rights represent a more valuable use of Sugarloaf Shores than development consistent with the FWS RPAs. Defendant nowhere concedes that development in accordance with the RPAs is not economically viable.

Plaintiff responded to defendant's proffer not with an appraisal report, but with the affidavit of a licensed real estate appraiser. In that five page affidavit, plaintiff's appraiser, Trent Marr, estimates the fair market value of Sugarloaf Shores under two different assumptions. First, Mr. Marr found that if the necessary permits could be obtained to effect the 1990 plan, Sugarloaf Shores would have a fair market value of $1,540,000.00. Second, Mr. Marr found that development of Sugarloaf Shores limited to the 1991 FWS RPAs would not be economically viable. Mr. Marr concluded that "based upon the determination by the U.S. Fish and Wildlife Service and the Corps of Engineers, that the property is a habitat for federally listed endangered species, has totally destroyed the property's marketability and therefore its fair market value." As a result, Mr. Marr placed the fair market value of Sugarloaf Shores after the Corps denial at between $23,000.00 and $40,000.00 for sale to an environmental or conservation group.

Absent from Mr. Marr's affidavit is an analysis of the economic value of development pursuant to the complete list of FWS RPAs. Mr. Marr also fails to consider the economic value of transferable development rights. Plaintiff has offered no other proffer on these issues. Accordingly, plaintiff has failed to present facts evidencing the existence of reasonable dispute concerning the economic value of these uses for Sugarloaf Shores. Instead, plaintiff has raised a legal challenge to the consideration of transferable development rights in this case.[45]

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[45] As noted earlier, plaintiff also raised a legal challenge to the consideration of the 1995 FWS RPAs. *See supra* at II.b.i. Even if plaintiff's challenge had proven successful, thereby barring a consideration of the $80,000.00 value ascribed to development pursuant to the total set of RPAs, plaintiff has nonetheless failed to raise a factual dispute concerning the value of transferable development rights available for Sugarloaf Shores.

*iv. Transferable Development Rights Under County Law*

Defendant's appraiser determined that Sugarloaf Shores retains economic value, notwithstanding the Corps action, for the sale of transferable development rights ("TDRs"). TDR programs aim to direct development away from environmentally sensitive land to land more suitable for development by creating a market for development rights. Logistically, TDR programs achieve this result by quantifying the development potential of sensitive properties ("sending sites"), and providing that this development potential may be sold to landowners to increase building density in areas suitable for development ("receiving sites").[46] Under the county's TDR program, see MCC § 95-265 (1986), Mr. Slack concluded that the TDR rights available for Sugarloaf Shores have a fair market value of $110,000.00. Plaintiff has not disputed these findings.[47]

Instead, plaintiff mounts a legal challenge to the consideration of TDRs, arguing that it is inappropriate to

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[46] *See generally* James T.B. Tripp and Daniel J. Dudek, *Institutional Guidelines for Designing Successful Transferable Rights Programs*, 6 Yale J. On Reg. 369 (1989); Brief of the State of New Jersey as Amicus Curiae in Support of Respondent in *Suitum v. Tahoe Regional Planning Agency*, 1997 WL 9054 (describing the active TDR market in the New Jersey Pinelands).

[47] Mr. Slack notes in his appraisal that in order to be marketed for TDRs, the downzoning of Sugarloaf Shores would be required. In conducting his appraisal, Mr. Slack consulted with county officials to determine whether such downzoning was a realistic assumption. County officials represented that this assumption was realistic since such downzoning would more accurately reflect Sugarloaf Shores' unimproved state relative to its current "improved subdivision" zoning classification. While plaintiff points out that the property is not presently zoned for TDR use, he does not dispute defendant's contention that it is realistic to assume that the necessary downzoning would be granted.

consider TDRs in determining takings liability. In *Penn Central*, however, the Supreme Court took the contrary view:

> While these rights [TDRs] may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burden the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.

*Penn Central*, 438 U.S. at 137; *see also Deltona Corp. v. United States*, 657 F.2d 1184, 1192 n.14, 228 Ct. Cl. 476, 490 n.14 (1981) (TDRs considered in evaluating the economic impact of the regulation), *cert. denied*, 455 U.S. 1017 (1982); *Gardner v. New Jersey Pinelands Comm'n*, 593 A.2d 251, 261 (N.J. 1991) (upholding development restrictions against takings challenge based, in part, on availability of TDRs); *J.T. Glisson v. Alachua County*, 558 So. 2d 1030, 1036 (D.C.A. 1 Fla. 1990) (rejection of takings challenge based, in part, on value of TDRs), *rev. denied*, 570 So. 2d 1034 (Fla. 1990).

While plaintiff acknowledges this precedent, he argues that the Supreme Court's recent decision in *Suitum v. Tahoe Regional Planning Agency* casts doubt upon its efficacy. Contrary to plaintiff's characterization, the Sureme Court in *Suitum* reaffirmed the relevance of TDRs to determining takings liability.

In *Suitum*, the regional land use scheme proscribed the development of plaintiff's property, but provided the plaintiff with valuable TDRs which she could sell to landowners in areas where development was permissible. Although the exact number of TDRs to which the plaintiff was entitled were known and could be properly appraised, the Ninth Circuit found her takings claim unripe because she

had not actually attempted to sell those rights. *Suitum v. Tahoe Reg'l Planning Agency*, 80 F.3d 359, 362-3 (9th Cir. 1996). The Supreme Court reversed, finding the takings claim ripe. *Suitum*, 117 S. Ct. at 1668. Three justices concurred in this judgment, but dissented to the portion of the majority opinion that analyzed the question of whether the plaintiff should have to sell her TDRs in order to present a ripe claim. Those justices objected to this analysis on the ground that it necessarily required the Court to accept as valid the premise that TDRs are relevant to the question of determining takings liability. *Id.* at 1670.

While the concurring justices in *Suitum* clearly indicate opposition to this proposition, their opinion underscores the Court's reaffirmance of the *Penn Central* holding that the value of TDRs is to be considered to answer the threshold question of whether a taking has occurred. Accordingly, plaintiff's legal challenge to the consideration of TDRs in this case is rejected.

*III.* Penn Central *Factors*

Plaintiff argues that even if his claim does not fall within the *Lucas per se* rule, he had reasonable investment-backed expectations to develop Sugarloaf Shores, and therefore can demonstate a taking under *Penn Central*.[48]

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[48] As noted earlier, in *Penn Central* the Supreme Court identified three factors to consider in analyzing a regulatory takings claim: the character of the government action, the economic impact of the regulation, and the extent to which the regulation interferes with reasonable investment-backed expectations. While it is determined that plaintiff's takings claim fails under the expectations factor, *see Monsanto*, 467 U.S. at 1013, it should be noted that the other two *Penn Central* factors have been considered by the court.

First, there was no infirmity in the character of the government action in this case. No physical occupation occurred here, and

In particular, plaintiff argues that he succeeds in this *Penn Central* claim because at the time he purchased Sugarloaf Shores, the ESA had not yet been enacted, and the Corps had not yet asserted jurisdiction over wetlands under the CWA. In the alternative, plaintiff argues that the Federal Circuit's recent decision in *Preseault* establishes that expectations are no longer relevant to the takings inquiry.

Both contentions are in error. First, federal law restricting the use of Sugarloaf Shores did predate plaintiff's initial purchase investment. Further, by the time plaintiff chose to invest in development, the specific restrictions at issue in this case were in place. Second, the Federal Circuit in *Preseault* explictly cautioned that its expectations analysis is limited to physical occupation takings claims, and is not properly applied to a takings claim which, as here, involves a restriction on land use. 100 F.3d at 1540.

*a. Reasonable Investment-Backed Expectations*

The reasonable investment-backed expectations factor of the *Penn Central* test properly limits recovery to property owners who can demonstrate that their investment was made in reliance upon the non-existence of the challenged regulatory regime. In part, the rationale for this rule is

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plaintiff concedes that the Corps action advances a legitimate government interest. Plf. Compl. at 21. Second, while the Corps action has had a significant economic impact, the uncontested findings of defendant's appraiser established a fair market value for Sugarloaf Shores, either for development or for the sale of transferable development rights, that approximates plaintiff's initial investment in Sugarloaf Shores. In evaluating the economic impact of a regulation outside of the *Lucas* context, the Federal Circuit has provided that "[i]n determining the severity of the economic impact, the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored." *Florida Rock II*, 791 F.2d at 905.

that one who invests in property with the knowledge of a restraint assumes the risk of economic loss. *Loveladies Harbor v. United States,* 28 F.3d 1171, 1177 (Fed. Cir. 1994); *Creppel v. United States,* 41 F.3d 627, 631 (Fed. Cir. 1994). This inquiry is informed not only by whether the specific regulatory restrictions at issue were in place at the time of purchase, but also by the regulatory climate at that time, and whether plaintiff's investment in purchase and development can be considered objectively reasonable in light of that climate.

The Court of Claims first considered the role of expectations in its 1981 decision in *Deltona.* In that case, the court rejected a takings claim brought by a Florida developer prohibited from completing a multi-phase development project after the broadening of the Rivers and Harbors Act ("RHA"), the passage of the CWA, and the Corps assertion of jurisdiction over wetlands pursuant to the CWA. Commenting upon some of the same regulatory restrictions at issue in this case, the court recognized that "[t]he implementing regulations adopted by the Corps of Engineers pursuant to its statutory authority have grown increasingly complex and rigorous since the late 1960's." 657 F.2d at 1187. Finding this strengthening of the regulatory regime to be the "key legal event" in the case, *id.*, the court held that Deltona's expectations in development were only reasonable until the law began to change. The court found no taking. *Id.* at 1190.

The impact of a pervasive regime on expectations was first squarely addressed by the Supreme Court in *Monsanto.* In that case, Monsanto argued that amendments to federal law which newly provided for the disclosure of trade secrets submitted to the government in pesticide registration resulted in a taking. The statute in effect at the time Monsanto submitted the information was silent on the

issue of disclosure. 467 U.S. at 1008. Recounting the long history of government regulation of the pesticide industry, the Court declined to narrowly limit the expectations inquiry to a consideration of the law in effect at the time of submission. *Id.* at 1013. Rather, relying upon the pervasiveness of this federal regulation, the Court found that Monsanto could not have a reasonable expectation that the federal government would not later require disclosure. The Court found no taking on the basis of expectations alone. *Id.*

A year later the Supreme Court affirmed the rule that property owners operating in a highly regulated field could not have a reasonable expectation that government regulation would not be altered to their detriment in *Connolly v. Pension Benefit Guarantee Corp.*, 475 U.S. 211, 227 (1985). In that case, the plaintiff argued that the amendment of federal pension law to require a greater financial contribution from employers than originally anticipated gave rise to a taking. Rejecting this claim, the Court found that "[t]hose who do business in a regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Id.* (quoting *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958)); *see also Concrete Pipe*, 508 U.S. at 645-6 (pension regulation).

This rule has been properly applied to takings claims involving real property where land development arises in a business context which, as in *Deltona*, is not different in kind from the highly regulated business enterprises at issue in *Monsanto*, *Connolly* and *Concrete Pipe*. In *Corn v. City of Lauderdale Lakes*, for example, a developer sought to put property to an industrial use permitted at time of purchase, but prohibited when he sought approval for that use a decade after purchase. Rejecting his takings

claim, the 11th Circuit found that the prohibition did not upset reasonable investment-backed expectations due to the pervasiveness of land use regulation, the length of time after purchase that the developer waited to secure development approval, and the fact that development was not backed by any investment other than the original purchase. 95 F.2d at 1070; *see also Ciampetti v. United States,* 22 Cl. Ct. 310, 320 (1991); *McNulty v. Town of Indialantic,* 727 F. Supp. 604, 610 (M.D. Fla. 1989).

*i. Regulatory Regime at Time of Initial Investment*

When plaintiff purchased Sugarloaf Shores in October 1973, land development in ecologically sensitive areas was already subject to pervasive federal and state regulation. Contrary to plaintiff's contention, that legal regime had been relied upon to restrict the development uses plaintiff sought for Sugarloaf Shores. Plaintiff explictly recognized this regime in his April 1973 purchase contract for Sugarloaf Shores wherein he acknowledged that "as of today there are certain problems in connection with the obtaining of State and Federal permission for dredging and filling operations." [49] Plf. Summ. J. Ex. at 7.

Those dredging and filling operations had, in fact, been subject to federal regulation since the 1899 enactment of the RHA and its prohibition on such activities except by permit. 33 U.S.C. § 403. By the late 1960s, the Corps RHA permit review included the consideration not only of navigation, but also of fish and wildlife, conservation, pollution, aesthetics, ecology and the general public interest. 33 C.F.R. § 209.120(d) (1968).

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[49] Lacking this explicit acknowledgment, plaintiff would nonetheless be constructively charged with knowledge of these restrictions. *See Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 385 (1947).

Prior to plaintiff's purchase of Sugarloaf Shores, the Corps was implementing this broad review standard to deny RHA permits for activities proposed by plaintiff, including the filling of tidal wetlands and the connection of canals landward of the MHWM to navigable waters. *Zabel v. Tabb,* 430 F.2d 199 (5th Cir. 1970), *cert. denied,* 401 U.S. 910 (1971), for example, involved a developer's challenge to the Corps 1967 denial of a RHA permit to fill tidal wetlands in Boca Ciega Bay, Florida, based upon ecological concerns. *Id.* at 202. The Fifth Circuit upheld the Corps denial. Similarly, *United States v. Sexton Cove Estates,* 526 F.2d 1293, 1298 (5th Cir. 1976) and *Weiszmann v. U.S. Army Corps of Engineers,* 526 F.2d 1302, 1303-5 (5th Cir. 1976), involved developer challenges to 1971 and 1973 Corps orders that RHA permits be obtained for the dredging of canals landward of the MHWM. The *Weiszmann* case involved property on Sugarloaf Key. Again, the Fifth Circuit upheld the Corps action.

The enactment of the CWA in 1972 broadened the federal government's reach over the nation's waters, making it unlawful to discharge pollutants into those waters except by permit. 33 U.S.C. § 1311(a). The Act placed the authority to regulate discharges of dredged or fill material in the Corps, 33 U.S.C. § 1344(a), and provided the Environmental Protection Agency ("EPA") with veto authority over Corps permitting decisions. 33 U.S.C. § 1344(c). Shortly after the passage of the 1972 Act, the EPA adopted its first wetlands policy of implementing its programs and authorities to protect wetlands from dredging and filling practices. Protection of Nation's Wetlands, 38 Fed. Reg. 10,834 (May 2, 1973) (recognizing that "[w]etlands represent an ecosystem of unique and major importance to the citizens of this Nation and, as a result, they require extraordinary protection.").

Prior to plaintiff's purchase of Sugarloaf Shores, federal law also required the Corps to consider the fish and wildlife impacts of its permitting decisions. The Fish and Wildlife Coordination Act ("FWCA") requirement that federal agencies proposing to alter any body of water to first consult wth the FWS concerning the fish and wildlife impacts of the action, 16 U.S.C. § 662(a), was first enacted in 1946. Act of August 14, 1946, ch. 965. RHA permit review by the Corps triggered this consultation requirement. *See Zabel*, 430 F.2d at 209 (FWCA consultation on RHA permit). FWS conservation recommendations issued under FWCA were to be considered by the Corps, which was then required to make "adequate provision" for the conservation of wildlife. Act of August 14, 1946, ch. 965, § 3. The first federal endangered species legislation followed FWCA in 1966. The Endangered Species Preservation Act, Pub. L. No. 89-699, §§ 1-3, 80 Stat. 926 (repealed 1973), gave the Secretary of the Interior the authority to list species "threatened with extinction," and to acquire land to protect such species.

Florida also regulated dredge and fill activities prior to plaintiff's purchase of Sugarloaf Shores. The Bulkhead Act of 1957, 1957 Fla. Laws 306, for example, instructed local authorities to establish bulkhead lines beyond which no filling activities could occur. Politicization of the bulkhead setting process led to the enactment of the Beach and Shore Preservation Act of 1965, 1965 Fla. Laws 1435, which removed the discretion of local authorities to set bulkhead lines, and required that permits be obtained to conduct activities below the MHWM. The Air and Water Pollution Control Act of 1967, 67 Fla. Laws 436, followed, and gave the Florida Department of Pollution Control the authority to regulate dredge and fill

activities landward of the MHWM. To these authorities, the Water Resources Act of 1972, 1972 Fla. Laws 1082, added the statutory charge of minimizing the degradation of water resources generally, and preserving fish and wildlife.[50]

By 1972, Florida had also enacted a comprehensive land use planning scheme. The State Comprehensive Planning Act, Fla. Stat. § 186.001-.911 (Supp. 1984), directed the state to prepare a comprehensive land use plan, and the Environmental Land and Water Management Act, Fla. Stat. § 380.012-.12 (1983 & Supp. 1984), created a statutory regime for regulating development in Areas of Critical State Concern. The Florida Supreme Court described this breadth of this latter statute:

> The Act affects regulation of virtually all development in an area of critical state concern: all building, mining, and changes in the use or appearance of land, water and air and appurtenant structures; material increases in the density of its use; alteration of shores and banks; drilling; structural demolition; clearing adjunct to construction; and deposit of waste or fill.

*Askew v. Cross Key Waterways*, 372 So. 2d 913, 916 (Fla. 1978). The Florida Keys were designated an Area of Critical State Concern in 1977.[51]

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[50] *See generally* Frank E. Malloney, Sheldon J. Plager, Richard C. Ausness & Bram D.E. Canter, *Florida Water Law* (1980).

[51] In *Cross Key*, the Florida Supreme Court found the statutory procedure for designating Areas of Critical State Concern unconstitutional on the theory that the procedure constituted an impermissible delegation of legislative power. 372 So. 2d at 918. The Florida Legislature later corrected this infirmity by formally designating the Keys an Area of Critical State Concern. Florida Keys Protection Act of 1979, Fla. Stat. § 380.0552 (1979).

Together these statutes mandated the consideration of the wildlife impacts of federal permitting activities, the protection of wetlands and the regulation of navigable waters. In the purchase contract for the property, plaintiff explicitly recognized that his sought uses were subject to restriction under this regulatory regime. As the Federal Circuit noted in *Loveladies*, where a landowner such as plaintiff purchases property with knowledge of the regulatory restraint, no taking will be found, in part, because "it coud be said that the market had already discounted for the restraint, so that a purchaser could not show a loss in his investment attributable to it." *Loveladies Harbor*, 28 F.3d at 1177. The pervasiveness of the regulatory regime at the time plaintiff purchaed Sugarloaf Shores deprives him of a reasonable expectation to effect his development plans under the holdings of *Monsanto* and *Deltona.*

*ii. Regulatory Regime at Time of Investment in Development*

Even if the December 1973 enactment of the ESA provided the relevant reference point for determining whether plaintiff had reasonable investment-backed expectations, his expectations claim would still fail. Plaintiff's investment in Sugarloaf Shores included not only his purchase of the property, but his subsequent investment in development.

Based upon defendant's appraisal in this case arriving at a fair market value of $110,000.00, plaintiff could have roughly recouped his initial investment in Sugarloaf Shores but for the expenditures he made in attempting to prepare the property for development. As noted earlier, plaintiff's first major investment in that development occurred in October 1980 when he hired Keycology to attempt to obtain federal, state and county development

permits. In his agreement with Keycology, plaintiff acknowledged that "obtaining said permits is at best difficult and by no means assured . . . ." Def. Summ. J. Ex. 33.

Indeed, by 1980 the regulatory regime that was in place at the time of plaintiff's initial purchase had been further strengthened. By 1974, the Corps had used its CWA authority to enjoin the filling of tidal wetlands. *See United States v. Holland*, 373 F. Supp. 665, 673 (M.D. Fla. 1974). The Corps issued interim final regulations in the next year to explicitly provide that waters of the United States included wetlands. *See Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).[52] Further, by 1975 the Florida Department of Pollution Control had also adopted rules to regulate dredge and fill activities above the MHWM. Fla. Admin. Code Ann. r. § 17-4.28(2) (1975).

Finally, as enacted in December of 1973, the Endangered Species Act contained the major elements that are still central to the statute today. The Act provided for the listing of threatened and endangered species, prohibited the take of those species, and required federal agencies to consult with the FWS to insure that agency actions would not jeopardize the continued existence of such species. Pub. L. No. 93-205, 87 Stat. 884 (1973). Florida en-

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[52] The Corps had initially interpreted the reference in the CWA to "waters of the United States" as limited by traditional concepts of navigability. This initial interpretation was first held invalid in *United States v. Ashland Oil and Transportation Co.*, 364 F. Supp. 349, 351 (W.D. Ky 1973) (CWA applies to non-navigable stream), *aff'd*, 504 F.2d 1317 (6th Cir. 1974). In the next year, the Corps changed its interpretation to reflect the congressional intent to assert jurisdiction over the nation's waters to the maximum extent permissible. *Callaway*, 392 F. Supp. at 686; *see also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 125 (1985) (recounting the legislative history of the 1972 CWA and affirming the Corps assertion of jurisdiction over wetlands).

acted its own similar endangered species legislation in 1977. Florida Endangered and Threatened Species Act of 1977, Fla. Stat. § 372.072.

By the time plaintiff began to invest in the development of Sugarloaf Shores, the regulatory regime in existence at purchase had been strengthened in order to achieve the purposes reflected in the earlier enactments. *See Connolly*, 475 U.S. at 227. In a case where a developer could recoup his initial investment in the property, but nonetheless chooses to continue to invest in development in the face of significant regulatory limitations, no reasonable expectations are upset when development is restricted or proscribed.

*b. The Role of Expectations in Physical Occupation as Distinguished from a Land Use Restriction Taking Case*

Following the Federal Circuit's 1996 decision in *Preseault*, plaintiff filed a supplemental brief, newly arguing that a consideration of expectations in this case was no longer appropriate in light of that ruling. Although plaintiff quotes extensively from *Preseault* to support his argument, he stops just short of including the one passage particularly relevant to this case. In that passage, the Federal Circuit distinguishes the expectations inquiry in a permanent physical occupation takings case from that inquiry in a case which, as here, involves a restriction on land use. This distinction defeats plaintiff's argument.

As noted earlier, the Supreme Court first explicitly distinguished takings claims involving the permanent physical invasion of property from takings claims involving restrictions on the use of property in *Loretto*. In that case, the Court found that where the government regulation authorizes such an invasion, a taking would be found without

reference to the other *Penn Central* factors, including reasonable investment-backed expectations. *Loretto,* 458 U.S. at 441. The rationale underlying this *per se* taking rule, the Court explained, is that "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property . . . property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property." *Id.* at 436. Accordingly, where a permanent physical occupation can be shown, it is effectively presumed that the occupation upsets expectations.

Notwithstanding *Loretto,* in *Preseault* the government argued that expectations should be considered in a physical occupation case. 100 F.3d at 1539. At issue in that case was whether the conversion of a railroad right-of-way to a public recreational trail pursuant to federal law gave rise to the taking of the underlying fee simple estate. In finding a taking, the Federal Circuit rejected the government's argument that the regulatory regime in existence preceding the landowners acquisition of the property, which included federal jurisdiction over the railroad rights-of-way, left the owners without a reasonable expectation that the government would not prevent reversion. The regulatory climate was not relevant, according to the Federal Circuit, because "permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation." *Id.* at 1540, (quoting *Loretto,* 458 U.S. at 441).

In the passage ignored by plaintiff in his brief to this court, the Federal Circuit was careful to distinguish the role of expectations in a physical occupation case from the role of expectations in a case involving a restriction on land use. The Federal Circuit explained: "[t]his issue of title and ownership expectations must be distinguished

from the question that arises when the Government restrains an owner's use of property, through zoning or other land use controls, without disturbing an owner's possession." *Preseault*, 100 F.3d at 1540. In the latter case where, as here, a restriction on use is implicated "expectations have been held to be relevant to the question of whether a regulatory imposition goes too far in constraining the owner's lawful uses of the property." *Id.*

*Preseault* simply follows *Loretto's per se* rule that the other *Penn Central* factors, including reasonable investment-backed expectations, are not relevant where an owner's possession of property is disturbed through a permanent physical occupation.[53] Plaintiff does not maintain, nor could he on the facts of this case, that his claim involves a physical taking. Accordingly, a consideration of expectations is central to the resolution of a regulatory takings claim where a restriction on land use is at issue. Plaintiff's lack of such an expectation here is determinative of his takings claim.

## CONCLUSION

Plaintiff recognized contemporaneously with his two major investments in the property that its ecological sensitivity would make it difficult to secure development approvals from federal, state and county officials. Land development at both points in time was a highly regulated business, and plaintiff's sought uses for Sugarloaf Shores

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[53] *Loretto* underlies the Supreme Court's rejection of the argument in *Nollan* that the expectations inquiry should be applied to find that the plaintiff there did not have a reasonable expectation to exclude members of the public from his beachfront property because the regulation at issue predated plaintiff's purchase. *Nollan*, 483 U.S. at 833 n.2. *Nollan*, like *Preseault*, implicated that *Loretto* physical occupation *per se* rule and the right to exclude others, rather than a restriction on land use.

were subject to restriction or prohibition under that regulatory regime. While plaintiff was free to take the investment risks he took in this regulated environment, he cannot look to the Fifth Amendment for compensation when such speculation proves ill-taken. Based upon the undisputed facts presented, it is decided that no taking by the United States has been demonstrated here.

Accordingly, IT IS ORDERED, that defendant's motion for summary judgment is GRANTED. Plaintiff's motion for summary judgment is DENIED. Final judgment shall be entered dismissing the complaint with no costs to be assigned.

/s/ James F. Merow
JAMES F. MEROW
Judge

Supreme Court, U.S.
FILED
DEC 23 1999
OFFICE OF THE CLERK

No. 99-881

In the
# Supreme Court of the United States

LLOYD A. GOOD, JR.,
*Petitioner,*
v.
UNITED STATES,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND AMERICAN FOREST & PAPER ASSOCIATION IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

1. Whether the Federal Circuit erred in holding--contrary to *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and in conflict with the decisions of many other federal courts of appeals and state appellate courts--that a government regulation depriving a property owner of all economically viable use of his land does not result in a *per se* or categorical taking under *Lucas* unless the property owner can also prove "reasonable, investment-backed expectations."

2. Whether the Federal Circuit erred in holding that a property owner who is denied federal permission to develop his property because of the presence of endangered species lacks a reasonable expectation of developing the property--even though he purchased it *prior to* enactment of the Endangered Species Act and the listing of the species in question--because he should have been aware that the "growing consciousness of and sensitivity toward environmental issues" would ultimately change "the regulatory climate" so as to bar his planned development.

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## INTEREST OF AMICI CURIAE[1]

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Since its inception 26 years ago, PLF has had extensive litigation experience in cases involving individuals adversely affected by government regulation of private property.

Attorneys for Pacific Legal Foundation have represented other property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see, e.g., Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and have participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 20 years. Pacific Legal Foundation has represented two clients in two petitions for writ of certiorari in cases that involved nearly identical issues to the one at bar. *See Kim v. City of New York*, 659 N.Y.S.2d 145, 681 N.E.2d 312, *cert. denied*, 118 S. Ct. 588 (1997); *Bell v. City of Virginia Beach*, 255 Va. 395, 498 S.E.2d 414, *cert. denied*, 119 S. Ct. 73 (1998). It has also filed amicus curiae briefs in support of petitioners in three other cases that have been submitted to this Court with issues identical to the present ones. *See Basile v. Town of Southampton*, 89 N.Y.2d 974, 655 N.Y.S.2d 877, 678 N.E.2d 489, *cert. denied*, 118 S. Ct. 264 (1997); *Gazza v. New York Department of Environmental Conservation*, 89 N.Y.2d 603, 657 N.Y.S.2d 555, 679 N.E.2d 1035, *cert. denied*, 118 S. Ct. 58 (1997), and *Forest Properties, Inc. v. United States*, 177 F.3d 1360 (Fed. Cir.), *cert. denied*, __ U.S. __ (1999). Pacific Legal Foundation

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae Pacific Legal Foundation and American Forest & Paper Association affirm that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

attorneys are also currently representing Claude and Micheline Lambert in a petition for certiorari before this Court in *Lambert v. City and County of San Francisco*, Supreme Court Docket No. 99-697, another case in which an appellate court denied a property owner relief for a regulatory taking. Because of the Foundation's experience in the field of regulatory takings, it can add a unique perspective that will assist this Court's consideration of this case.

Amicus American Forest & Paper Association is the national trade association of the forest, pulp, paper, paperboard and wood products industry. American Forest & Paper Association represents approximately 400 member companies and related trade associations (whose memberships are in the thousands) which grow, harvest, and process wood and wood fiber; manufacture pulp, paper, and paperboard products from both virgin and recycled fiber; and produce solid wood products. With an annual payroll of approximately $46 billion, this vital national industry accounts for over 8% of the total United States manufacturing output, employs some 1.4 million people, and ranks among the top ten manufacturing employers in 46 states. Members own approximately 50 million acres of private forest land throughout the United States.

Pursuant to Supreme Court Rule 37.2(a), written permission from all parties for Pacific Legal Foundation and American Forest & Paper Association to file this brief has been lodged with the Clerk of this Court.

## STATEMENT OF THE CASE

During the 19th century, when private individuals acquired riparian wetlands from the State of Florida they acquired an "absolute proprietary interest in the lands" while any land *under* a navigable waterway was also "subject to a governmental duty to protect the public rights of navigation and fishing." Michael L. Rosen, *Public and Private Ownership Rights in Lands Under Navigable Waters: The Governmental/*

*Proprietary Distinction*, 34 Univ. Fla. L. Rev. 561, 585 (1982). In other words, property owners had, under traditional state law, the right to improve nonsubmerged wetlands. *See id.*

In 1899 Congress passed the Rivers and Harbors Appropriation Act of 1899. Title 33 U.S.C. § 403 of that Act prohibits the obstruction of navigable waterways unless the Secretary of Army authorizes the work. In the early years, with rare exceptions, the Secretary denied authorizations only when the work would obstruct commerce. *See Zabel v. Tabb*, 430 F.2d 199, 207-08 (5th Cir. 1970). In time, especially as prompted by other statutory concerns, the Secretary denied authorizations for ecological reasons. *Id.* at 209. And in 1972 Congress adopted a version of the Clean Water Act that added section 404, codified at 33 U.S.C. § 1344, giving the Secretary further regulatory authority over "waters of the United States." At no time did Congress ever assert title to privately owned wetlands or tidelands (except to the extent that a navigational servitude has always existed for the protection of navigation).[2]

In 1973 Lloyd Good and his late mother purchased 40 acres of property on Lower Sugarloaf Key in Florida. Opinion of the United States Court of Appeals for the Federal Circuit, *reproduced in* Petitioner's Appendix at 2a. Thirty-two acres of this parcel is wetland. *Id.* The Goods were aware that they would have to obtain state and federal permits to develop this property, and they were aware that the process could be cumbersome. *Id.* However, nothing in the existing regulatory regime gave rise to an understanding that permits would ***not*** be forthcoming, and certainly there is nothing in the record to indicate that compensation would not be forthcoming if the necessary permits were denied.

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[2] The trial court found that the navigational servitude did not cause a denial of all economically viable uses in Petitioner's property. Opinion of the Court of Federal Claims *reproduced in* Petitioner's Appendix at 48a.

Later in 1973 Congress enacted the Endangered Species Act, 16 U.S.C. § 1531, *et seq*. In 1975 the Corps expanded the scope of its regulatory jurisdiction under the Clean Water Act. *See* Opinion of the Federal Circuit Court, Pet. App. at 13a (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123-24 (1985)). In the late 1970's the State of Florida passed its own legislation that protected endangered species and the Florida Keys. *See* Opinion of the Federal Circuit Court, Pet. App. at 14a.

Lloyd Good began the odyssey of trying to develop his property in 1980. *Id.* at 2a. At first, Good had no trouble with the United States, having obtained a dredge and fill permit in 1983. *Id.* at 3a. This permit was replaced with a new but substantially similar permit in 1988. *Id.* at 3a, 5a. He obtained all of his required state permits by 1984, *id.*, and would have been able to develop his land at that time but for an appeal brought by the Florida Department of Community Affairs. *Id.* at 4a. As so often happens in land development cases, and as set out in detail in the opinions below, Good's journey through the regulatory maze turned from Byzantine to Kafkaesque. *See id.* at 4a-7a, *and* Opinion of the Court of Federal Claims, Pet. App. at 19a-41a. Problems with the federal, state, and local permitting agencies put a halt to any thoughts of a quick resolution.

Pursuant to the Endangered Species Act, and while Good was in the throes of the permit process, the Lower Keys marsh rabbit was listed as endangered in 1990 as was the silver rice rat in 1991. Opinion of the Federal Circuit Court, Pet. App. at 6a-7a.

The dredge and fill permit that Good obtained in 1988 expired on October 17, 1993. *See id.* at 7a *and* Opinion of the Court of Federal Claims, Pet. App. at 24a. Prior to 1993 the Fish and Wildlife Service had recommended modifications to the 1988 permit in order to protect the rabbit and rat but the Corps

failed to act on those recommendations before the permit expired. *See* Opinion of the Federal Circuit Court, Pet. App. at 7a *and* Opinion of the Court of Federal Claims, Pet. App. at 24a. Good applied for a new scaled back permit in July of 1990. *See* Opinion of the Federal Circuit Court, Pet. App. at 5a-6a. Almost four years later, and based on the Fish and Wildlife Service's recommendation, the Corps denied this permit application in March of 1994. *Id.* at 7a. The Corps also notified Good that the 1988 permit had expired. *Id.*

This action followed.

Good argued that the Corps' permit denial deprived him of all economically viable use of his property. The trial court did not agree, finding that 14 years of the permit process were not enough and that Good might have been able to secure permission to build a less intensive development. *See* Opinion of the Court of Federal Claims, Pet. App. at 59a. The trial court was also impressed by evidence that the property had some *value*, *id.* at 68a-71a, and that the existence of transferable development rights, under a state program, provided the potential of enough value to obviate a taking.[3] *Id.* at 74a.

The Federal Circuit found that it did not need to reach the issue of whether the regulatory action deprived Good of all economically viable use of his property. *See* Opinion of the Federal Circuit Court, Pet. App. at 9a. Instead it found that, regardless of whether there had been a denial of economically viable use, Good "could not have had a reasonable expectation that he would obtain approval to fill ten acres of wetlands in

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[3] The court concluded that this Court held in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, that "the value of TDRs is to be considered to answer the threshold question of whether a taking has occurred." Opinion of the Court of Federal Claims, Pet. App. at 74a. This Court, however, finding "we have no occasion to decide" the relevance of TDRs to the existence of a taking, expressly declined to reach that issue. 520 U.S. at 728.

order to develop the land." *Id.* at 12a. That is because the court concluded that Good was "[s]urely . . . not oblivious" to the trend of "rising environmental awareness translated into ever-tightening land use regulations." *Id.* at 14a.

## REASONS FOR GRANTING THE WRIT

## I

## SUMMARY AND INTRODUCTION

At bottom, this case is about whether there remains any meaning to the concept of "background principles" to the law of property. Are property rights as evanescent as the fog or are the rights that are associated with the ownership of property anchored in a more solid firmament? Pacific Legal Foundation and American Forest & Paper Association are becoming increasingly alarmed by a trend in some of the lower courts that denies just compensation for regulatory takings simply because of the fortuitous circumstance that the offending regulation is adopted--but not necessarily applied--before the complaining owner acquired the affected property. In fact Pacific Legal Foundation and American Forest & Paper Association believe this trend represents the single greatest threat to the established principles of property ownership in the nation.

As alarming as this trend is, we could not have imagined how damaging it could possibly become until confronted with the *reductio ad absurdum* extension of the doctrine in the present case. Here, there is more than the mere happenstance of a not-yet-applied regulation being adopted prior to the acquisition of property that traps the owner. In the case of Lloyd Good, the court below found that Mr. Good ***knew***, or at least "was not oblivious" to the "trend," of "rising environmental awareness" that might translate into the adoption of "ever-tightening land use regulations." *Id.* at 14a. According to the court below, the knowledge that an offending regulation might be adopted ***after*** the acquisition of the property means

that Mr. Good has no right to complain after that regulation is ultimately adopted and applied. *Id.*

This case asks whether Lloyd Good is entitled to compensation because the United States refused to give him a permit to make economic use of his land. To answer this question, one must first understand the nature of the "background principles" of the property rights that attach to Good's property. Next, one should determine whether the evolving scheme of regulatory constraints may have affected those "background principles" to such an extent that he is not entitled to compensation.

Lloyd Good's petition focused on the lower courts' misunderstanding of the relevance and meaning of this Court's "reasonable investment backed expectations" test in the context of a climate of "ever-tightening land use regulations." This amicus brief will focus on the conflict the decision below creates with established understandings of the "background principles" of property. Amici will demonstrate that the Circuit Court's opinion is inconsistent with the principles embodied in the Constitution whereby the Framers understood that the role of government is to protect private property, rather than acquire it without compensation. In this light, the opinion is also in conflict with opinions of this Court and several lower courts as well.

## II

## PROPERTY DOES NOT CHANGE FORM WHEN NEW REGULATIONS ARE ADOPTED OR WHEN WE CAN ANTICIPATE THE ADOPTION OF NEW REGULATIONS AND THEN THE OWNERSHIP IS SUBSEQUENTLY TRANSFERRED

Central to the decisions of the courts that have ruled that third party purchasers cannot maintain a takings claim is the thesis that property is a highly mutable commodity. Under this theory, the alteration of property is a two step process. First, a

regulatory restriction is adopted (or, in this case, contemplated). That restriction may flow from many sources. Here, for example, a restriction might derive from the adoption of the Rivers and Harbors Appropriation Act of 1899, the Clean Water Act, or the Endangered Species Act. Such a restriction may remove certain development rights from the property--or at least make them subject to a permitting requirement. But the adoption of the restriction itself does not alter the original owner's ***rights*** to the property or the development rights. An owner could recover just compensation if the owner can prove in a facial or as-applied challenge that a regulatory taking has occurred.

The second step that completes the alteration of the property is the acquisition by a third party ***after*** the regulation is adopted (or contemplated). If the original owner could not bring a facial takings challenge,[4] and if the original owner could not bring an as-applied challenge (due perhaps to the lack of financial resources to pursue an application, the lack of desire to develop the property, or the premature demise of the owner), then the restricted development rights devolve to the government upon the moment the remainder of the property is transferred to a third party. Here, the third party is Lloyd Good who purchased the property. Because Good bought his property when regulatory restrictions were already foreseeable he cannot now argue that his development rights have been "taken."

The court below couched this result in terms of Mr. Good's "investment-backed expectations." That analysis is lacking. If the original owner had legitimate expectations and

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[4] With respect to wetlands regulations, this Court has observed that the mere existence of a permitting requirement does not give rise to a taking. A wetland owner must try, and fail, to obtain a permit before a taking can be alleged. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. at 126.

Mr. Good did not, than where did the expectations go and when? The court surely is not suggesting that the expectations disappear the moment regulations are adopted or contemplated. But the alternative, that expectations disappear upon sale, is equally dissatisfying.

If one instead focuses on where the development rights have gone, it is clear that they now belong to the government. The original owner has sold all rights to the property and lacks the requisite legal interest to file an application to develop the property; the original owner cannot ripen a takings claim and has no property interest left to vindicate. The new owner can apply for permission to develop. But if permission is denied based upon the application of a regulatory restriction that is in place at the time of acquisition, the new owner cannot receive any compensation for the lost development rights. Thus, the court's focus on Good's apparent lack of "investment-backed expectations" is only a focus on the ***mechanism*** of how Good is found to have no compensable development rights. But the ***result*** of the court's decision is a rule that interests in property are transformed when regulated property changes hands. The "bundle of sticks" that make up property is split into two: those interests that are restricted by the regulation devolve to the government and the new owner keeps whatever is left. This alteration of the property, of course, may be inchoate at the time of the property transfer and may not be apparent until permit applications are denied.

In the case of Lloyd Good, the situation is more surreal. The denial of his application was not based solely upon regulatory restrictions in place at the time he purchased his property, but on restrictions that followed from the Endangered Species Act, which was adopted several months after he purchased the property. And what is more, the listing of the Lower Keys marsh rabbit and the silver rice rat did not occur until nearly two decades after the purchase.

What exactly does this imply? If the past is any guide to the future, anyone purchasing property today is capable of understanding that newer and more onerous land-use restrictions may be adopted in the future. Thus, the transformation of property in this nation is complete and total. Because we all are "not oblivious" to the "rising tide" of land-use regulation, we can all anticipate that governments will adopt far more sweeping and onerous land-use restrictions in the future (especially now that the restraint of just compensation has apparently been removed). In fact, most property owned today was acquired at a time when future regulations, whether they be environmental, zoning, or social, could be anticipated by those who were "not oblivious" to their surroundings. Thus, the result of the court's reasoning is that all right to use property is not truly a right possessed by individuals but instead is held by the government. Sometimes the government may give an "owner" the "right" or, more accurately, the "privilege" to develop property; other times the government may deny permission. And because the government holds the development rights, and especially because the putative owner of the property should have known this, there can be no complaint for just compensation.

Why the government should obtain a windfall just because the property's original owner did not bring a ripened takings claim has never been explained. It is true that the subsequent purchaser may have acquired the regulated property at a discount. But why should this matter? The new owner is assuming certain expenses, risks, and transaction costs in pursuing the permit process and takings claim. The question here is not whether any just compensation damages are fairly allocated between the original owner and the subsequent purchaser, but whether the government will have to pay any damages at all to anyone at all. Under the Federal Circuit's rule, the answer is no. Because the owner at the time the regulatory

scheme was adopted (or, in this case, contemplated) was not the same person who made the permit applications, the government gets the benefits of a regulatory taking with none of the costs.

The notion represented by the court's decision that the right to use and develop property is not a fixed and solid right, but instead is something that can easily devolve to the government (if it has not already devolved) upon the transfer of property is a notion that should trouble this Court. For one thing, it would seem to be a notion that was rejected a long time ago in the beginning days of the republic. The debate is not new between those who have theorized that rights derive from the state and those who suggest that rights are inherently possessed by individuals. What is new for this Court is the expression of the first theory by the Federal Circuit Court of Appeals in the otherwise innocuous realm of environmental regulation. The remainder of this brief will demonstrate that the theory of the Federal Circuit's opinion is contrary to the history and structure of the Constitution, the opinions of this Court, and the opinions of other lower courts.

### A. The History and Structure of the Constitution Is Antithetical to a Theory That Government Can Acquire the Right to Use and Develop Property Without Paying Just Compensation

John Locke wrote that property, in the fullest understanding of the meaning of that word, is a right inherently possessed by individuals and that individuals only give up certain rights to government in order to better protect their property:

> [Man] seeks out, and is willing to joyn in Society with others who are already united, or have a mind to unite for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property*.

> The great and *chief end* therefore, of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property.*

John Locke, *Two Treatises of Government*, The Second Treatise § 123 (Peter Laslett ed., 2d ed. 1967, amended 1970) (emphasis, spelling, and punctuation in original). As many legal scholars have noted, Locke's idea that government is instituted to protect property, rather than the government being the source of property, deeply influenced the Framers, especially James Madison, as they drafted the Constitution. *See, e.g.,* Bernard H. Siegan, *Property and Freedom: The Constitution, the Courts, and Land-Use Regulation* 14-19 (1997) (discusses Locke's influence); Dennis J. Coyle, *Property Rights and the Constitution: Shaping Society Through Land Use Regulation* 228-30 (1993) (same); Henry V. Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States?*, 10 Univ. of Puget Sound L. Rev. 351, 378-80 (1987) (same); *see also* Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 41, 314-15 (1996) (discusses Madison's growing concern over usurpation of property by local governments); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 554-55, 578-79 (1972) (discusses precursors to adoption of Lockean view in federal constitution).[5]

The structure of the original constitution was designed to protect property from, among other things, popular agitation for "an abolition of debts, for an equal division of property, or for

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[5] It would be, of course, quite superficial to suggest that only John Locke influenced the Framers' views of the relationship between government and property and the role of property in society. Space, and respect for this Court's time and patience, does not permit amici to embark upon an exhaustive explication of the historical and philosophical understandings of property. For a fuller recent treatment of the subject see Richard Pipes, *Property and Freedom* (1999).

any other improper or wicked project." The Federalist No. 10 (James Madison) (Bantam ed., 1982). Later the Fifth Amendment added an even more explicit protection of private property.

The difficulty posed by the decision below is that all the words about the role of government to protect property would be hollow formalisms if government truly possessed the right to use and develop privately owned property that the government has neither purchased nor condemned. The Framers' conception of property would be equally meaningless if the government could acquire those critical rights upon the mere adoption (or, as in this case, upon the mere contemplation) of a regulation followed by the transfer of the underlying property to a new owner.

A lower federal court posed the dilemma this way:

> Under such logic, [government] . . . could pass a law that stated that no one could build on their property. After all property had passed hands once, the right to build on one's property would be lost to everyone.

*Store Safe Redlands Associates v. United States*, 35 Fed. Cl. 726, 735 (1996). Such a scheme for government acquisition of property is inconsistent with the Framers' vision of the relationship between property owners and their government. The Framers contemplated only one way by which the federal government could acquire private property against the will of the owner--through the use of the condemnation power. *See* Stoebuck, *supra*, at 576-77; Siegan, *supra*, at 27. Only this Court can restore the balance.

### B. The Opinion of the Circuit Court, That Government Can Acquire Development Rights in Property Merely by Adopting Regulations and Waiting for the Land to be Transferred to a New Owner, Is in Conflict with Opinions of This Court

#### 1. This Court Has Enforced Constitutional Limitations on the Ability of Governments to Take Property Without Compensation

In its early years this Court came down strongly against uncompensated usurpations of private property by government. In *Fletcher v. Peck*, 10 U.S. 87 (1810), this Court examined Georgia's attempt to reacquire the title to millions of acres of land that had been purchased by good faith purchasers from others who had acquired the land from Georgia through corruption. Justice Marshall found the "act of transferring the property of an individual to the public" was both oppressive and a violation of the Contracts Clause. Georgia could not "pass[] a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void." 10 U.S. at 139. In *Terrett v. Taylor*, 13 U.S. 43, 50-51 (1815), Justice Story wrote that Virginia's attempt to take property of the Episcopal Church was "utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property regally acquired."

Amici submit that the federal government cannot do indirectly what Georgia and Virginia could not do directly.

#### 2. This Court Has Not Countenanced Government Defining Property Anew in Order to Take It

In more modern times this Court has again returned to the understanding that government cannot alter the meaning of property in order to divest it from private owners. In *Hughes v.*

*State of Washington*, 389 U.S. 290, 296-97 (1967), Justice Stewart, concurring, noted that "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." A retroactive assertion that property did not exist is no different from the court below holding that the development rights in Lloyd Good's property vanished (or were divested to the federal government) upon his acquisition of the property.

Nowhere did this Court more clearly demonstrate the fallacy of the Federal Circuit's holding in *Good* than in *Nollan v. California Coastal Commission*, 483 U.S. 825, where this Court wrote:

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

*Id.* at 833 n.2.

More recently still, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992), this Court again returned to the idea that "the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." This Court held that the proper focus must be upon the "background principles" of property: "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas*, 505 U.S. at 1029. This

implies the existence of principles that do not whimsically change every time newly regulated property changes hands.

In a recently published article, Professor Steven J. Eagle is highly critical of the notion that just compensation is not available when the application of a regulation takes private property just because the owner purchased the land subject to an existing regulatory scheme. *See* Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the Rule of Law*, 42 N.Y.L. Sch. L. Rev. 345, 376 (1998). One of Professor Eagle's principal criticisms is that this doctrine artfully rewrites this Court's holding in *Lucas*. Focusing on several holdings from New York that reached the same conclusion as the Federal Circuit in this case, Eagle suggests that the right to bring an inverse condemnation claim must be transferable with the property. Otherwise, the court

> converts an important component of the fee simple--the right to use one's land--into a personal right that has to be exercised during life or else vanishes.

*Id.* at 368.

The opinion of the court below strays from the principle that government cannot rewrite the definition of property in order to suit its own needs. In short, the adoption of a land-use or environmental regulation cannot destroy the right to use or develop property without compensation either before or after the property is acquired by a third party. This Court should take review in order to ensure that the lower courts no longer countenance the alteration of "background principles" through a post-regulatory transfer of property.

### 3. The Doctrine of Investment-Backed Expectations Does Not Grant Government License to Take Riparian Property

To be fair, of course, the court below did not overtly say that it was redefining the nature of newly regulated property

with every subsequent transference of that property. As noted earlier, the court couched its holding in terms of Mr. Good's "reasonable investment-backed expectations." In this regard the court was relying on this Court's opinion in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 124 (1978), where it was noted that an analysis of reasonable investment backed expectations is one factor that a court may look to in determining whether there has been a regulatory taking. This Court, at 438 U.S. at 128, credited the derivation of this test to Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1229-34 (1967). But Michelman cautions that expectations are not the exclusive way of defining property for he later said that there

> seems to be little historical or philosophical basis for a conclusion that constitutional property rights are exclusively reliance-based or expectation-based, that they are purely derivative and in no way direct, and that what counts as constitutionally protected property can at any moment be fully told by deciding what entitlements can from time to time be inferred from official standing law.

Frank I. Michelman, *Property as a Constitutional Right*, 38 Wash. & Lee L. Rev. 1097, 1103 (1981). Michelman finds unsatisfactory the result of a pure expectations theory that, when combined with a denial of compensation to riparian owners, would force those riparian owners to discount the value of their property. *Id.* at 1106. Instead, Michelman believes there "must be some kind of direct right of property under the Constitution" and cites *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), as a paradigmatic example where the rights of

riparian owners were protected ***despite*** expectations. *Id.* The Corps could no more take Kaiser-Aetna's property without paying for it then it can take Lloyd Good's.

### C. There Is Great Conflict Among the Lower Courts on the Question of Whether the Government Acquires a Property Interest upon a Third Party's Acquisition of Regulated Property

To be sure, several states in recent years have adopted the same rule followed by the Federal Circuit below. These states include New York, *see, e.g., Kim v. City of New York*, 659 N.Y.S.2d 145, 681 N.E.2d 312, *cert. denied*, 118 S. Ct. 588 (1997); Virginia, *see Bell v. City of Virginia Beach*, 255 Va. 395, 498 S.E.2d 414, *cert. denied*, 119 S. Ct. 73 (1998); Iowa, *see Hunziker v. Iowa*, 519 N.W.2d 367 (Iowa 1994), *cert. denied*, 514 U.S. 1003 (1995); and New Hampshire, *Claridge v. New Hampshire Wetlands Board*, 485 A.2d 287 (N.H. 1984). Amici find this to be a most disturbing trend.

But other states and the Ninth Circuit have rejected this rule. For example, New Jersey recently held in *Karam v. State of New Jersey Department of Environmental Protection*, 705 A.2d 1221 (N.J. Super. 1998), *aff'd by adopting appellate opinion*, 723 A.2d 943 (N.J. 1999), that the right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter's knowledge. The Ninth Circuit in *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468 (9th Cir. 1994), found that an as-applied but not a facial takings challenge can be brought by a purchaser of regulated property. Likewise, in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *aff'd*, 118 S. Ct. 1359 (1999), the Ninth Circuit allowed a landowner's takings claims to proceed despite the fact that land was purchased with knowledge of permitting requirements. In Florida the court in *Vatalaro v. Department of Environmental Regulation*, 601 So. 2d 1223,

1229, *reh'g denied*, 613 So. 2d 3 (Fla. 1992), held that even though Vatalaro acquired property after a regulatory scheme was adopted, she could still pursue an as-applied takings claim. The court reasoned that no taking occurred until after the state denied Vatalaro's permit application when the state determined her property was suitable only for limited passive recreational use. *See also Cottonwood Farms v. Board of County Commissioners of the County of Jefferson*, 763 P.2d 551, 555 (Colo. 1988) ("The majority of courts have held that the fact of prior purchase with knowledge of applicable zoning regulations does not preclude a property owner from challenging the validity of the regulations on constitutional grounds, but does constitute a factor.").

Despite earlier indications to the contrary in *Preseault v. United States*, 100 F.3d. 1525 (Fed. Cir. 1996) (subsequent owners can pursue regulatory taking claim against federal government even though challenged regulation that allegedly took property was adopted long before acquisition by current owners), the Federal Circuit in *Good* has clearly joined New York, New Hampshire, Virginia, and Iowa. Its holding is in conflict with the Ninth Circuit, and the courts of New Jersey, Florida, and Colorado. It is time for this Court to resolve this conflict.

## III

## CONCLUSION

Lloyd Good lost his property because he was not oblivious to the potential that more onerous land-use regulations might be adopted after his purchase. This rule is contrary to the United States Constitution, opinions of this Court, and the holdings of at least four other inferior tribunals. It represents, however, a trend that has been adopted in four states and that poses the most significant threat to well-established understandings of the

place of property rights in this Nation. It is respectfully submitted that this Court grant the petition for writ of certiorari.

DATED: December, 1999.

Respectfully submitted,

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No. 99-881

# In the Supreme Court of the United States

LLOYD A. GOOD, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether a property owner's failure to demonstrate interference with his reasonable, investment-backed expectations may be dispositive of his regulatory takings claim, without regard to the economic impact of the challenged government regulation.

2. Whether the court of appeals correctly held that the denial of petitioner's application for a dredge-and-fill permit under the Rivers and Harbors Appropriation Act of 1899 and the Federal Water Pollution Control Act did not effect a taking of petitioner's property.

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# In the Supreme Court of the United States

No. 99-881

LLOYD A. GOOD, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 189 F.3d 1355. The opinion of the Court of Federal Claims (Pet. App. 16a-87a) is reported at 39 Fed. Cl. 81.

### JURISDICTION

The judgment of the court of appeals was entered on August 31, 1999. The petition for a writ of certiorari was filed on November 24, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. This case involves a 40-acre parcel of land abutting Sugarloaf Sound (a navigable waterway) in Lower Sugarloaf Key, Monroe County, Florida. The parcel

consists of two wetlands areas—26 acres of salt marsh fringed with mangroves, and six acres of freshwater sawgrass marsh—separated by an uplands area of roughly eight acres. Pet. App. 19a. The parcel was part of a $2 million portfolio of properties located throughout Lower Sugarloaf Key and Saddlebunch Key. *Id.* at 20a & n.2. Petitioner acquired a 70 percent interest in the parcel (as part of the portfolio) in 1973, and he acquired the remainder of the parcel two years later upon the death of his mother. *Ibid.* The total cost of the parcel in 1973 was $66,576.68. C.A. App. 389.[1]

When petitioner and his mother purchased the parcel in October 1973, each of the federal permit requirements relevant to this case was already in effect. Indeed, in the purchase contract for the parcel, petitioner expressly acknowledged the risk that "as of today there are certain problems in connection with the obtaining of State and Federal permission for dredging and filling operations." Pet. App. 2a. Section 10 of the Rivers and Harbors Appropriation Act of 1899 (RHA) prohibited construction activities below the mean high water mark (MHWM) of navigable waters without a permit from the Army Corps of Engineers (Corps). See 33 U.S.C. 403. A permit was also required under RHA Section 10 for construction activities occurring above

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[1] The petition states that petitioner and his mother purchased the land in 1973 for approximately $93,000. Pet. 3. In fact, $92,718.78 is petitioner's claimed "basis" in the property. Pet. App. 20a. That basis was calculated by adding $46,603.68 (the 1973 purchase price of petitioner's 70% share) and $46,115.10 (the asserted value of the 30% share belonging to petitioner's mother as of her death in 1975). C.A. App. 389. The 1973 purchase price of petitioner's mother's share was $19,973. *Ibid.* Thus, the total 1973 purchase price of the parcel was $66,576.68 ($46,603.68 plus $19,973).

the MHWM for purposes of creating a connection to and/or expanding the scope of the navigable waters (*e.g.*, in this case, the dredging of a canal or marina connecting to Sugarloaf Sound).[2] Since 1968, applications for RHA Section 10 permits had been subject to the Corps' "public interest review" regulations, which required the Corps to scrutinize a project's effects on water quality, recreation, fish and wildlife, pollution, and natural resources, in addition to effects on navigation. See 33 C.F.R. 209.120(d)(1) (1973); 33 C.F.R. 320.4(a); *United States* v. *Alaska*, 503 U.S. 569, 580-581 (1992) (describing the development of the Corps' approach, and stating that "the language of the statute and [the Court's] decisions interpreting it plainly authorized" the Corps' consideration of the factors set forth in the regulation); *Deltona Corp.* v. *United States*, 657 F.2d 1184, 1187 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982).[3]

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[2] See *United States* v. *Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1296-1299 (5th Cir. 1976); *Weiszmann* v. *United States Army Corps of Engineers*, 526 F.2d 1302, 1304 (5th Cir. 1976); *United States* v. *Joseph G. Moretti, Inc.*, 526 F.2d 1306, 1310 (5th Cir. 1976).

[3] In *Zabel* v. *Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971), the court of appeals upheld the Corps' authority to consider conservation factors in making permitting decisions under Section 10 of the RHA. The court observed that the RHA "does not put any restrictions on denial of a permit or the reasons why the Secretary may refuse to grant a permit to one seeking to build structures on or dredge and fill his own property." *Id.* at 207. After extensive consideration of the RHA and related statutory provisions, *id.* at 207-214, the court concluded that "the Secretary can refuse on conservation grounds to grant a permit under the Rivers and Harbors Act," *id.* at 214. The court observed, *inter alia*, that the Corps is required under the Fish and Wildlife Coordination Act (FWCA), 16 U.S.C. 661 *et seq.*, to consult with the

In 1972, Congress enacted Section 404 of the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. 1344.[4] Section 404 expanded the geographic scope of the Corps' regulatory jurisdiction by requiring a permit for discharges of dredge or fill material into any "navigable waters," 33 U.S.C. 1344(a), defined for purposes of the CWA as "the waters of the United States," 33 U.S.C. 1362(7). The Corps' jurisdiction under Section 404 is not limited by traditional conceptions of navigability but includes, *inter alia*, wetlands above the MHWM that are adjacent to navigable waters. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131-135 (1985).[5] Applications for Section 404 permits are subject to review both under the Corps' public interest review regulations and under specific environmental guidelines promulgated by the United States Environmental Protection Agency (EPA) and the Corps pursuant to Section 404(b)(1) of the CWA, 33 U.S.C. 1344(b)(1). See 40 C.F.R. Pt. 230; see also 33 U.S.C. 1344(c) (authorizing

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U.S. Fish and Wildlife Service and state conservation agencies regarding wildlife conservation issues before issuing a Section 10 permit. 430 F.2d at 209 & n.18.

[4] Section 404 of the CWA was enacted as part of the 1972 amendments to the Federal Water Pollution Control Act. See Pub. L. No. 92-500, § 2, 86 Stat. 884.

[5] The Corps did not revise its CWA Section 404 regulations to require permits for discharges of dredged or fill material into adjacent wetlands until 1975. See *Riverside Bayview*, 474 U.S. at 123-124. By the time of petitioner's purchase, however, the term "navigable waters" in the CWA had been judicially construed to reach all waters that may be regulated under the Commerce Clause. See *United States* v. *Ashland Oil & Transp. Co.*, 364 F. Supp. 349, 351 (W.D. Ky. 1973), aff'd, 504 F.2d 1317 (6th Cir. 1974).

EPA to veto the Corps' issuance of a Section 404 permit based on, *inter alia*, adverse impacts on wildlife).[6]

2. Petitioner's efforts to develop the parcel at issue here began in 1980, when he entered into a contingency-fee arrangement with a consulting firm to obtain the necessary local, state, and federal permits. Pet. App. 21a. The agreement provided that petitioner would pay a fixed fee of $24,000, plus one-third of any increase above $350,000 in the value of the parcel. *Ibid.* The agreement noted that "obtaining such permits is at best difficult and by no means assured." *Ibid.*

Petitioner first applied for a federal RHA/CWA dredge-and-fill permit in 1981. Pet. App. 22a.[7] His application (as amended) was based on a plan to build a 54-lot subdivision of single-family homes, complete with a 48-slip marina providing navigable access to Upper Sugarloaf Sound. *Ibid.* The development would have eliminated approximately 12.8 acres of wetlands. *Id.* at 22a-24a. The Corps granted that permit in 1983. *Id.* at 22a.[8] Petitioner was ultimately unable, however, to secure all of the necessary state and local regulatory approvals. *Id.* at 24a-30a.

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[6] State environmental regulation of coastal development in the Florida Keys had been in place well before 1973. See Pet. App. 80a-82a.

[7] Work requiring a permit under both the RHA and CWA may be addressed in a joint RHA/CWA permit application. Pet. App. 22a n.5 (citing 33 C.F.R. Pt. 325 App. A).

[8] The Corps issued a second, slightly modified permit in 1984. Pet App. 22a. In 1988, it granted petitioner a new RHA/CWA permit, with one significant modification. *Id.* at 23a-24a. The new permit restricted the filling of each wetlands-based lot to 40-by-40 foot building pads. *Id.* at 24a. That change would have reduced the overall wetlands loss from 12.8 acres to 10.53 acres. *Ibid.*

3. In 1990, petitioner applied to the Corps for a new RHA/CWA permit based on a revised plan. Pet. App. 30a.[9] The revised plan involved construction of 16 single-family homesites (all in wetlands, on completely filled lots), a navigable canal connecting to Upper Sugarloaf Sound, and a tennis court. *Id.* at 5a-6a, 30a-31a. Although the 1990 plan reduced the density of residential development as compared to the previous 54-lot plan, the plan would have only slightly reduced the overall loss of wetlands, from 10.53 acres to 10.17 acres. *Id.* at 30a.

Shortly before petitioner submitted the 1990 application, the Lower Keys marsh rabbit was listed as endangered under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.* See 55 Fed. Reg. 25,588 (1990). In April 1991, the silver rice rat was also listed as endangered. See 56 Fed. Reg. 19,809 (1991). Pursuant to Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), the Corps and the United States Fish and Wildlife Service (FWS) therefore initiated formal "consultation" on the project.[10] The FWS issued a Biological Opinion

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[9] Petitioner did not seek state or local approval for that plan. The Court of Federal Claims determined, however, that the plan would be subject to Monroe County's prohibition on dredging to provide access for docking facilities and on filling of salt marsh except where necessary to provide access to a parcel. See Pet. App. 27a, 30a.

[10] Section 7(a)(2) of the ESA requires federal agencies to "insure that any action" they authorize "is not likely to jeopardize the continued existence of any endangered species." 16 U.S.C. 1536(a)(2). If an agency determines that a proposed action may adversely affect an endangered species, it must engage in formal consultation with the FWS, which in turn must provide the agency with a written "Biological Opinion." 16 U.S.C. 1536(a)(2); 16 U.S.C. 1536(b)(3)(A). If the FWS determines that the proposed action will "jeopardize the continued existence" of the species, 16 U.S.C.

in December 1991, concluding that petitioner's proposed development was likely to jeopardize the continued existence of both species. Pet. App. 36a. As required by the ESA (see note 10, *supra*), the FWS proposed a series of "reasonable and prudent alternatives" to petitioner's plan, which would have allowed development of the parcel in a manner protective of the species. *Id.* at 36a-37a.

Although petitioner was afforded an opportunity to participate in the process by which the reasonable and prudent alternatives were developed, he declined to do so. Pet. App. 37a-38a & n.24. Instead petitioner submitted a letter from his environmental consultant and mammalogist, Dr. Larry Brown. *Id.* at 38a. Dr. Brown expressed the view that the marsh rabbit and silver rice rat were not found on the parcel in question, and that petitioner's proposed development therefore would not jeopardize the continued existence of the listed species. *Ibid.*

In March 1994, the Corps denied petitioner's permit application on the ground that the development proposed by petitioner would jeopardize the continued existence of the marsh rabbit. C.A. App. 338, 347. The Corps endorsed the reasonable and prudent alterna-

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1536(a)(2), the FWS must, if at all possible, suggest "reasonable and prudent alternatives" that would allow the project to go forward, 16 U.S.C. 1536(b)(3)(A). If an incidental "taking" of individual members of a listed species is likely to occur as a result of the proposed project, the Biological Opinion must include a statement "specify[ing] the impact of such incidental taking" (commonly known as an "incidental-take statement"). 16 U.S.C. 1536(b)(4). So long as the permit applicant complies with the terms and conditions of the statement, any incidental take is exempt from liability under the Act. See 16 U.S.C. 1536(*o*); see generally *Bennett* v. *Spear*, 520 U.S. 154, 157-158 (1997).

tives suggested by the FWS, explaining that they were consistent with the project's purpose and would prevent jeopardy to the listed species. Pet. App. 39a. In response, petitioner asserted for the first time (based on a new report from Dr. Brown) that *any* development on the parcel would violate the ESA. *Id.* at 39a-40a. Shortly thereafter, petitioner filed suit against the United States in the Court of Federal Claims (CFC), alleging that the Corps' denial of his permit application had effected a taking of his property. *Id.* at 40a.[11]

4. The CFC granted summary judgment for the United States. Pet. App. 16a-87a. The court held that petitioner could not establish a "total" taking under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), because the Corps' actions did not render the parcel valueless or deprive petitioner of all economically viable use of his land. Pet. App. 51a-74a. The CFC relied on uncontested evidence presented by the

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[11] In 1995, after petitioner's suit had been filed, the FWS initiated a re-evaluation of its Biological Opinion and invited petitioner to assist in revising the reasonable and prudent alternatives to determine the full extent to which the site could be developed without jeopardizing the listed species. Pet. App. 40a-41a. Petitioner reiterated his "refus[al] to participate in any way in the alleged amended Biological Opinion." C.A. App. 981. In May 1995, the FWS issued a new Biological Opinion with revised reasonable and prudent alternatives. Pet. App. 41a. The revised alternatives would have allowed construction of seven or eight waterfront homesites in wetlands, complete with boat moorings and a navigable canal connecting to the Sound, in addition to significant development of the uplands portion of the site. *Ibid.*; C.A. App. 372-375, 385. The 1995 Biological Opinion included an Incidental Take Statement, which would shield petitioner from liability under the ESA for any incidental take of listed species, if petitioner implemented the reasonable and prudent alternatives in compliance with the statement's terms and conditions. *Id.* at 375-377.

government's appraiser, who had determined that (1) the property would have a fair market value of $80,000 if development were permitted in accordance with the revised reasonable and prudent alternatives[12] (*id.* at 68a-71a), and (2) the highest and best use of the property was for the sale of transferrable development rights (TDRs), which were worth approximately $110,000 (*id.* at 72a-74a).

The CFC also held that petitioner could not establish a taking under the three-part test set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978). Pet. App. 74a-86a. The CFC ruled that the Corps' actions could not have interfered with petitioner's reasonable, investment-backed expectations, given the pervasiveness of the state and federal regulatory regimes in place at the time of petitioner's investment, and the fact that petitioner had knowingly assumed the risk that it might be difficult to obtain approvals for his project. *Id.* at 78a-84a. The court noted in particular that the sorts of dredge-and-fill operations contemplated by petitioner's development proposal

> had * * * been subject to federal regulation since the 1899 enactment of the RHA and its prohibition on such activities except by permit. By the late 1960s, the Corps RHA permit review included the consideration not only of navigation, but also of fish and wildlife, conservation, pollution, aesthetics, ecology and the general public interest.

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[12] In conducting that analysis, the government's appraiser assumed (contrary to the CFC's subsequent determination, see note 9, *supra*) that state and local approvals could be obtained for such a project. Pet. App. 70a.

*Id.* at 78a (citation omitted).

5. The court of appeals affirmed. Pet. App. 1a-15a. The court rejected petitioner's argument that his reasonable, investment-backed expectations were irrelevant to his "total" taking claim. *Id.* at 9a-11a. It held that "[r]easonable, investment-backed expectations are an element of every regulatory takings case." *Id.* at 10a. Because the court of appeals found "the expectations factor dispositive" in the instant case, it declined to address "the character of the government action or the economic impact of the regulation." *Id.* at 9a.

Petitioner emphasized that the Corps had approved his prior RHA/CWA permit applications and had denied the 1990 application solely on the ground that the proposed development would jeopardize the continued existence of a newly listed endangered species. See Pet. App. 11a-12a. Because the enactment of the ESA and the listing of the species postdated his acquisition of the property, petitioner contended that denial of the permit on ESA grounds necessarily interfered with his reasonable, investment-backed expectations. See *id.* at 12a. The court of appeals rejected that contention. It observed that

> [i]n 1973, when [petitioner] purchased the subject land, federal law required that a permit be obtained from the Army Corps of Engineers in order to dredge or fill in water adjacent to a navigable waterway. Even in 1973, the Corps had been considering environmental criteria in its permitting decisions for a number of years.

*Ibid.*

The court of appeals noted as well that development of the subject parcel required approval by state and county officials, and that petitioner had "acknowledged

both the necessity and the difficulty of obtaining regulatory approval" at the time he acquired the property. Pet. App. 13a. The court also explained that environmental regulation had grown more pervasive during the period between 1973 (when petitioner and his mother bought the parcel) and 1980 (when petitioner undertook his initial efforts to develop the property). *Id.* at 13a-14a. In light of all those factors, the court of appeals concluded that petitioner "lacked the reasonable, investment-backed expectations that are necessary to establish that a government action effects a regulatory taking." *Id.* at 15a.

## ARGUMENT

The court of appeals' decision is correct and does not conflict with the decisions of this Court, any other court of appeals, or any state court of last resort. Further review is not warranted.

1. The requirement of a Corps permit for dredge-and-fill operations of the sort at issue here was established long before petitioner and his mother purchased the subject property in 1973. See Pet. App. 12a, 78a; pp. 2-3, *supra*. The Corps' authority under Section 10 of the RHA is broad indeed. "The statute itself contains no criteria by which the Secretary is to make an authorization decision; on its face, the provision appears to give the Secretary unlimited discretion to grant or deny a permit." *United States* v. *Alaska*, 503 U.S. 569, 576 (1992).

The breadth of discretion vested in the Corps by Section 10 reflects the paramount federal interest in activities affecting navigable waters. With respect to navigable waters, the federal government possesses

> a "dominant servitude," *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954), which extends

> to the entire stream and the stream bed below ordinary high-water mark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject.

*United States* v. *Rands*, 389 U.S. 121, 123 (1967); see *United States* v. *Cherokee Nation*, 480 U.S. 700, 703-705 (1987). Although "this Court has never held that the navigational servitude creates a blanket exception to the Takings Clause," *Kaiser Aetna* v. *United States*, 444 U.S. 164, 172 (1979),[13] petitioner was on notice in 1973 that his ability to undertake development affecting navigable waters would be subject to extensive federal oversight.[14]

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[13] *Kaiser Aetna* involved an unusual situation in which a developer dredged a private fishpond in Hawaii and connected the fishpond to a nearby navigable bay by opening a channel across a barrier beach that had separated the two. 444 U.S. at 166-167. The United States then relied on the navigational servitude in asserting (1) that the pond had come under the Corps' authority under the RHA, and (2) that the public should have a right of access to the pond. *Id.* at 168-169. Although the Court held that mandating a right of public access to the pond would constitute a taking in the circumstances presented, *id.* at 177-180, it distinguished the scope of the navigational servitude for purposes of federal regulatory authority, including that of the Corps under the RHA, and it did not question the holding of the lower courts in that case that the developer's connecting of the pond to the nearby bay subjected the pond to the Corps' regulatory authority under the RHA. See *id.* at 169 & n.3, 171 & n.6.

[14] Petitioner's proposed development affected navigable waters in two respects. First, the CFC found that petitioner's "1990

It was also clear, at the time of purchase, that the Corps' decision whether to grant or deny a development permit would be based in part on environmental factors, including wildlife conservation. See Pet. App. 12a, 78a; p. 3 & note 3, *supra*. The enactment of the ESA in December 1973 changed the governing legal regime to a degree by forbidding the Corps to approve a development project that was likely to jeopardize the continued existence of an endangered species. Even before the ESA was enacted, however, the Corps possessed discretion to deny a permit application on that ground. Petitioner therefore could not have possessed a reasonable expectation that he would be permitted to develop his waterfront parcel in a manner inconsistent with wildlife conservation values generally, or with the protection of especially vulnerable species in particular. Indeed, the Fifth Circuit—which at that time included the State of Florida—had held in 1970 that the Corps was required to consult with the FWS and state conservation agencies regarding wildlife conservation issues before issuing a Section 10 permit. See *Zabel* v. *Tabb*, *supra*, discussed at note 3, *supra*, and in *United States* v. *Alaska*, 503 U.S. at 581.

At bottom, the fundamental inquiry in every takings case is "whether justice and fairness require that economic injuries caused by public action must be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Eastern Enter.* v. *Apfel*, 524 U.S. 498, 523 (1998) (opinion of

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Corps application clearly indicates that he proposed dredging below the [mean high water mark]." Pet. App. 46a n.28. Second, petitioner's development proposal included the dredging of a canal that would connect to Upper Sugarloaf Sound and thereby provide the residents with waterfront access. *Id.* at 30a-31a.

O'Connor, J.) (brackets and internal quotation marks omitted). In the instant case, petitioner chose to purchase land subject to a "dominant servitude" of the federal government. Petitioner was on notice at the time of purchase that any development affecting navigable waters would implicate important federal interests and would therefore require express federal approval. He was on notice as well that the Corps was vested by the RHA with very broad discretion to determine whether particular development proposals should be allowed, and that the permitting process would include consideration of wildlife conservation and other environmental values.

The existence of those potential barriers to development (as well as parallel state and local permitting requirements) was presumably factored into the purchase price. As the court of appeals recognized, "[o]ne who buys with knowledge of a restraint assumes the risk of economic loss. In such a case, the owner presumably paid a discounted price for the property. Compensating him for a 'taking' would confer a windfall." Pet. App. 11a (quoting *Creppel* v. *United States*, 41 F.3d 627, 632 (Fed. Cir. 1994)).[15] Of course, if petitioner

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[15] See also Pet. App. 10a ("In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss. In economic terms, it could be said that the market had already discounted for the risk, so that a purchaser could not show a loss in his investment attributable to it."); *Pro-Eco, Inc.* v. *Board of Comm'rs*, 57 F.3d 505, 511-512 (7th Cir.) (noting that a landowner who "knew at the time it bought the land that the Board's ordinance would hinder their efforts to develop the land however they wished" presumably factored that potential difficulty into the purchase price for the property), cert. denied, 516 U.S. 1028 (1995). In the instant case, petitioner expressly acknowledged at the time of purchase that "as of today there are certain problems in connec-

had succeeded in obtaining all of the requisite government approvals for his most ambitious development proposal, he would have reaped an enormous profit. But given the speculative nature of his original investment, petitioner cannot reasonably contend that the costs of wildlife protection have been "disproportionately concentrated" (*Eastern Enters.*, 524 U.S. at 523 (opinion of O'Connor, J.)) upon him. To the contrary, petitioner *chose* to purchase land for which the prospects of development were uncertain and the degree of federal regulatory oversight high.[16]

2. Petitioner contends that the court of appeals' decision conflicts with this Court's decision in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). That argument is incorrect.

*Lucas* did not hold that a property owner's reasonable, investment-backed expectations are irrelevant whenever a "total" taking is alleged. As *Lucas* ex-

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tion with the obtaining of State and Federal permission for dredging and filling operations." Pet. App. 2a.

[16] Consideration of reasonable, investment-backed expectations in this context is also supported by *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984). In that case, the Court ruled that public disclosure of a company's proprietary data could not constitute a taking, where the company "had no reasonable, investment-backed expectation that its information would remain inviolate in the hands of EPA." *Id.* at 1008. The Court found that factor alone to be decisive, despite acknowledging that public disclosure of such data could completely "destroy" the "economic value of [the] property right" at issue. *Id.* at 1012; see also *id.* at 1005 (finding that "the force of [the reasonable, investment-backed expectations] factor is so overwhelming * * * that it disposes of the taking question"). The Court thus recognized that the absence of interference with reasonable, investment-backed expectations may itself be dispositive of a regulatory takings claim, regardless of the extent of the challenged regulation's economic impact.

plained, this Court has "generally eschewed any set formula" in deciding "when, and under what circumstances, a given regulation * * * [goes] too far for purposes of the Fifth Amendment," preferring instead to "engag[e] in . . . essentially ad hoc, factual inquiries." *Lucas*, 505 U.S. at 1015 (internal quotation marks omitted). Three factors are of "particular significance" to that ad hoc inquiry: "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action." *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 495 (1987).

In *Lucas*, this Court noted that there are "at least two discrete categories of regulatory action [that are] compensable without case-specific inquiry into the public interest advanced in support of the restraint": regulations that compel the property owner to suffer a physical "invasion" of his property, and regulations that deny "all economically beneficial or productive use of land." 505 U.S. at 1015. Although the Court held that such cases may receive "categorical treatment," in the sense that there is no need for "case-specific inquiry into the public interest advanced in support of the restraint," the Court did not say that a property owner's lack of reasonable, investment-backed expectations would be of no moment.[17]

The plaintiff in *Lucas* had acquired two beachfront lots in South Carolina in 1986, at a time when "he was

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[17] See also *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring in the judgment) ("The finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations. * * * Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.").

not legally obligated to obtain a permit from the [South Carolina Coastal] Council in advance of any development activity." 505 U.S. at 1008. He intended to erect single family residences on his lots, as the owners of the immediately adjacent parcels had been allowed to do. *Ibid.* The enactment in 1988 of the South Carolina Beachfront Management Act, however, "brought Lucas's plans to an abrupt end." *Ibid.* The Act and its implementing regulations created a new, absolute ban on coastal-zone construction, which effectively prohibited development of Lucas's tract. *Id.* at 1008-1009. Under those circumstances, the Court held that, if the effect of the development ban was to render the parcels valueless, the ban would effect a Fifth Amendment taking. *Id.* at 1020-1032.

The Court also recognized, however, that land-use regulation will not effect a compensable taking, even if it prohibits all economically beneficial use of the property, if the limitations it imposes "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." 505 U.S. at 1029. The Court cited the federal government's navigational servitude as an example of the sort of "pre-existing limitation upon the landowner's title" the enforcement of which would not trigger takings liability. *Id.* at 1028-1029. The Court also made clear that no compensable taking occurs when the government discovers new information revealing that a particular use of land runs afoul of a pre-existing limitation. See *id.* at 1028-1029 (recognizing that "the corporate owner of a nuclear generating plant" is not entitled to compensation under the Fifth Amendment "when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault").

As we explain above, it was clear at the time petitioner bought the subject parcel that dredge-and-fill activities affecting navigable waters implicated substantial and longstanding federal interests; that the Corps of Engineers would have very broad discretion to determine whether any such activities would be permitted; and that its exercise of discretion would include consideration of (*inter alia*) wildlife conservation factors. Those limitations on the use of the parcel "inhere[d] in [petitioner's] title." *Lucas*, 505 U.S. at 1029. Nor can petitioner establish a takings claim simply through proof that the presence of endangered species on the subject parcel was unknown and unanticipated at the time of purchase. As with the hypothetical nuclear generator described in *Lucas*, the belated discovery that particular uses of petitioner's land fall under a pre-existing limitation does not disappoint petitioner's reasonable, investment-backed expectations in a manner that could give rise to takings liability.

3. The court of appeals' decision in this case does not conflict with the holdings of any other court of appeals or state court of last resort. Most significantly, none of the cases on which petitioner relies involves federal regulation of activities affecting the navigable waters of the United States. Petitioner's claim of a conflict incorrectly assumes (*inter alia*) that the constitutional rules generally governing land-use regulation apply with full force to property that is subject to the federal government's navigational servitude. The cases cited by petitioner are distinguishable on other grounds as well.

The Ninth Circuit cases cited by petitioner (Pet. 12-17) are inapposite. In *Dodd* v. *Hood River County*, 136 F.3d 1219 (9th Cir.), cert. denied, 119 S. Ct. 278 (1998),

for instance, the court noted (in the course of finding no taking) that *Lucas* did not apply to the case before it because the zoning decision being challenged had not deprived the claimant's property of all value. *Id.* at 1228. The court's one-sentence description of the categorical takings test under *Lucas* (*ibid.*) was *dictum*.

The Ninth Circuit's decision in *Del Monte Dunes at Monterey, Ltd.* v. *City of Monterey*, 95 F.3d 1422 (1996), aff'd, 526 U.S. 687 (1999), is similarly inapposite. There, the court held that the evidence presented at trial was sufficient to support the jury's finding that the city had deprived the property owner of all economically viable use of its land. *Id.* at 1432-1434. The court did not address the question whether property owners who find themselves in that situation are entitled to just compensation even where they lacked any reasonable, investment-backed expectation that they would be able to develop their property. Furthermore, the court characterized a *Lucas*-based categorical taking as "absolute" in that "no inquiry into the state's interests advanced in support of the regulation is required" (*id.* at 1432)—a statement consistent with the decision below.[18]

Petitioner cites a string of state court decisions (Pet. 14-17), but none of them creates a conflict that would warrant this Court's review. Of the four cases on which petitioner places primary reliance (Pet. 14-15), only the Vermont Supreme Court's decision in *Chioffi* v. *City of*

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[18] Petitioner also relies (Pet. 13-14) on the district court's findings in *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 34 F. Supp. 2d 1226 (D. Nev. 1999). But that decision has been appealed, see Nos. 99-15641 & 99-15771, appeals pending (9th Cir.), and, in any event, a conflict with a single district court opinion would not provide a sufficient basis for invoking this Court's review.

*Winooski*, 676 A.2d 786 (1996), was issued by a state court of last resort. The holding of that case, however —a finding that no taking had occurred because, *inter alia*, the zoning variance denial at issue did not cause a total diminution in value (*id.* at 790)—poses no conflict with the decision below.

The other three state court cases that petitioner highlights are decisions of intermediate appellate courts in which further review has been granted.[19] In any event, in none of those cases did the court squarely confront the situation where an owner, whose property has been rendered valueless by government action, cannot demonstrate any interference with reasonable, investment-backed expectations. Indeed, we are aware of no decision, from a court of appeals or a state court of last resort, in which a court has found a taking while holding that the challenged government regulation did not interfere with the claimant's reasonable, investment-backed expectations.

4. Even if the question presented warranted this Court's review, the instant case would be an inappropriate vehicle for resolving it. Neither the ESA nor the Corps' denial of petitioner's 1990 permit application placed a blanket prohibition on development of petitioner's parcel or, therefore, deprived it of all economic use of value. To the contrary, the 1995 revised reasonable and prudent alternatives, drafted by the FWS and endorsed by the Corps, represent the agencies'

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[19] See *McQueen* v. *South Carolina Coastal Council*, 496 S.E.2d 643 (Ct. App. 1998), cert. granted, No. 2779 (S.C. Mar. 18, 1999); *Adams Outdoor Adver.* v. *City of East Lansing*, 591 N.W.2d 404 (Ct. App. 1998), review granted, No. 113674 (Mich. Nov. 30, 1999); and *City of Miami* v. *Keshbro, Inc.*, 717 So. 2d 601 (Dist. Ct. App. 1998), review granted, 729 So. 2d 392 (Fla. 1999).

determination that petitioner's proposal could be modified to protect endangered species while at the same time allowing a significant degree of development (including construction of seven or eight out of the 16 proposed waterfront homesites). See note 11, *supra*. Petitioner also remains free to suggest other means by which the parcel could be developed in a manner that does not jeopardize listed species, but he has thus far declined to do so. See Pet. App. 37a-40a (describing petitioner's prior refusal to cooperate in the process by which reasonable and prudent alternatives to his 1990 development proposal were formulated). And petitioner could develop the uplands portion of the tract without obtaining an RHA/CWA permit from the Corps.

Moreover, the CFC squarely held that the Corps' permit denial did not render the subject property valueless because the property (a) would have a fair market value of $80,000 if development were permitted in accordance with the revised reasonable and prudent alternatives proposed by the FWS and accepted by the Corps (and if all necessary state and local approvals could be obtained), and (b) could also be used for the sale of transferrable development rights worth $112,000. Indeed, the parcel at issue is currently worth more in absolute dollar terms (though presumably somewhat less in constant dollars) than the $66,576.68 (see note 1, *supra*) that petitioner and his mother paid for it. Because the Corps' denial of petitioner's permit application did not deprive the property of all economic value, petitioner could not establish a compensable taking even if the court were required to ignore the question whether he had any reasonable, investment-backed expectations at the time of purchase.

In the court of appeals, petitioner contended that the relevant comparison for "total taking" purposes was between the value of the parcel under the reasonable and prudent alternatives suggested by the Corps, and the value the land would have had if petitioner's 1990 permit application had been granted in full (assuming in each case that petitioner could obtain the requisite state and local approvals). See Pet. C.A. Br. 26-32. Thus, petitioner relied on evidence that the property would have a value of between $1,200,000 and $1,540,000 if it could be developed in the manner described in petitioner's 1990 permit application. *Id.* at 27. By comparing that hypothetical value to the property's current value of $80,000 (for development under the revised RPAs, assuming state and local approval) or $112,000 (for the sale of TDRs), petitioner contended that the Corps' permit denial had effected a "diminution" in the parcel's value of over 90%. *Id.* at 23, 27, 28, 32.

The practical implications of petitioner's legal theory—*i.e.*, his contention that a land-use restriction that precludes all economically viable use effects a taking regardless of whether the owner had a reasonable, investment-backed expectation that he would be able to develop the property—cannot realistically be assessed in isolation from the issue of how a denial of economically viable use is to be identified. As we explain above, petitioner has contended that a "diminution" in value sufficient to establish a "total" taking can be established by comparing the property's actual value to the hypothetical value it would have if an existing use restriction were eliminated. When combined with petitioner's contention that reasonable, investment-backed expectations are irrelevant in a "total taking" case, petitioner's theory has extraordinary implications

for land-use regulation. His theory logically implies that a person could purchase a tract of real property that was subject to pre-existing restrictions (*e.g.*, land that was zoned for a particular use) and *immediately* establish a total taking simply through proof that the land would dramatically appreciate in value if the restrictions were eliminated. Nothing in this Court's decisions supports such a result.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
# Supreme Court of the United States

LLOYD A. GOOD, JR.,
*Petitioner,*
v.
UNITED STATES,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

1. The first question presented here is a straightforward, and undeniably important, question of constitutional law: Whether a *per se* taking under *Lucas* [1] occurs when a government regulation deprives property of all economic value, even if reasonable, investment-backed expectations —one of the *Penn Central* [2] factors—are not shown. The Federal Circuit squarely held that a property owner must show such expectations to win under *Lucas* and rejected Good's *Lucas* claim on the expectations factor alone, without disputing that his property had been deprived of all

[1] *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992).

[2] *Penn Cent. Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978).

value. Pet. App. 9a-11a. The Government contends that that holding was correct. Opp. 16.

The Government attempts to deny the conflict between the decision below and the decisions of numerous other federal and state appellate courts (Opp. 18-20), but the conflict is stark and undeniable. *See* Pet. 12-17.[3] Thus, in *Dodd* v. *Hood River County*, 136 F.3d 1219, 1228 (9th Cir.), *cert. denied*, 119 S. Ct. 278 (1998), the Ninth Circuit ruled: "In *Lucas*, the Supreme Court held that there is a categorical taking when a regulation prohibits all economically benefical use of land, and no balancing of other factors commonly analyzed in takings law—reasonable investment backed expectations and legitimate government interest—would be necessary." The Government's assertion that this statement was dicta (Opp. 19) is simply wrong.[4]

As shown in the petition, numerous courts—including no fewer than six state supreme courts—have interpreted *Lucas*, like the Ninth Circuit in *Dodd*, not to require consideration of the expectations factor of the *Penn Central* test where a deprivation of all economic value is shown. *See* Pet. 12-17. The Government tries to chip away at

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[3] The Government does not dispute that a mountain of scholarly work has construed *Lucas* the way we do, *see* Pet. 18-19, nor does the Government cite a single work to the contrary. Rather than deal with the scholarly commentary, the Government ignores it.

[4] In *Dodd* the court faced a question of issue preclusion. The Dodds had litigated, and lost, a takings claim under the Oregon Constitution in state court; they then brought a Fifth Amendment takings claim in federal court. To determine the preclusive effect of the state court adjudication on the Dodds' federal claim, the Ninth Circuit had to identify and compare the elements of an Oregon takings claim and a federal takings claim. The Ninth Circuit held that the Oregon adjudication precluded the Dodds' *Lucas* claim but that, because Oregon does not consider the investment-backed expectations factor, the Dodds' *Penn Central* claim was not precluded. Thus, the Ninth Circuit's articulation of what is and what is not required under *Lucas* was absolutely essential to its decision.

the conflict on grounds that some of the cases we cite are on appeal or were rendered by intermediate state appellate courts or federal district courts. *See* Opp. 19-20 & nn. 18 & 19. But there is no denying that both courts and commentators have held or recognized that a deprivation of all economic value—without more—is a taking under *Lucas*.

Indeed, since the filing of the petition, the D.C. Circuit has joined the many courts that construe *Lucas* the way we do. *See District Intown Properties Ltd. Partnership* v. *District of Columbia*, 198 F.3d 874 (D.C. Cir. Dec. 17, 1999). There, the D.C. Circuit distinguished *Lucas* claims from *Penn Central* claims. The court said that "a 'categorical' or *per se* taking" occurs under *Lucas* when "the government denies *all* economically beneficial or productive use of property," whereas in a *Penn Central* case, a court balances three factors, including "the regulation's interference with the claimant's reasonable, investment-backed expectations." *Id.* at 879 (emphasis in original). Judge Williams, too, in an opinion concurring in the judgment, observed the "distinction between partial and total takings" and "the two modes of analysis" under *Penn Central* and *Lucas*. *Id.* at 886. And he underscored the importance of the distinction when he wrote that since "[f]ew regulations will flunk th[e] nearly vacuous [partial takings] test," *Lucas* is a property owner's only real hope of obtaining just compensation for a regulatory taking. *Id.*[5]

On the merits of the issue, the Government and the Federal Circuit simply cannot be right that *Lucas* requires a

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[5] In *Ali* v. *City of Los Angeles*, 91 Cal. Rptr. 2d 458, 463 (Cal. Ct. App. Dec. 28, 1999), *review filed* (Cal. Feb. 4, 2000), which was also decided after the petition was filed, the court held that the City's "denial of [a] demolition permit deprived Ali of all economically viable use of his land" and thus was a taking under *Lucas* without any consideration of whether Ali had investment-backed expectations.

showing of reasonable, investment-backed expectations in addition to a deprivation of all economic value. This Court in *Lucas* repeatedly stressed that it was applying a categorical or *per se* rule. *See* 505 U.S. at 1015, 1019 n.8, 1026. But if the economic impact of the regulation *and* the property owner's expectations must be considered, there is literally no difference between *Lucas* and the *Penn Central* test.[6] Furthermore, *Lucas* itself said that when government deprives property of "all economically beneficial use, we think it may resist compensation *only* if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027 (emphasis added). The Government tries to fit this case within the exception recognized in *Lucas*, claiming that Good's development would violate "pre-existing limitation[s]" on his title. Opp. 17-18. But the regulation that proscribed Good's development—the Endangered Species Act ("ESA")—was *not* pre-existing; it was enacted *after* Good purchased the property.[7]

The Government has no response at all to our showing, *see* Pet. 11, that a physical invasion—another kind of categorical taking—"is a taking without regard to other factors that a court might ordinarily examine," *Loretto*,

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[6] The third and final *Penn Central* factor—the character of the government action—only counsels finding a taking when the action is a physical invasion of property. *See Penn Central*, 438 U.S. at 124; *District Intown*, 198 F.3d at 883. But actions of that character are themselves categorical takings. *See Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982).

[7] Unlike the situation with respect to the hypothetical nuclear power plant on an earthquake fault (Opp. 17), the two species on Good's property were not legally protected, or even determined to be endangered, until after Good bought the land. Thus, unlike the rule against building on a fault line, interference with these species was not "*always* unlawful." *Lucas*, 505 U.S. at 1030 (emphasis in original). Instead, the ESA was "newly legislated." *Id.* at 1029.

458 U.S. at 432, such as the expectations factor. If physical invasion cases do not require consideration of expectations, neither should total takings cases. *See Lucas*, 505 U.S. at 1029 (the two types of categorical takings should receive "similar treatment").

Finally, the Government's citation of Justice Kennedy's opinion concurring in the judgment in *Lucas* (Opp. 16 n.17)— far from supporting its reading of *Lucas*—only highlights the difference between the majority opinion and Justice Kennedy's lone concurrence.[8] The Government's reliance on *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984) (Opp. 15 n.16), is also misplaced because in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), this Court held that the odd facts of *Monsanto* had no bearing on cases involving "the right to build on one's property." *Id.* at 833 n.2.

2. The second question presented concerns the Federal Circuit's holding that Good lacked reasonable investment-backed expectations. The Government's defense of that holding is startling. The Government contends that Good lacked a reasonable belief that he could develop his property because "long before petitioner and his mother purchased the subject property in 1973," Opp. 11, the Rivers and Harbors Act of 1899 ("RHA") and the Clean Water Act ("CWA") required him to obtain a federal permit, and his land was subject to the government's "navigational servitude." Opp. 2-5, 11-15.

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[8] *See The Supreme Court, 1991 Term—Leading Cases*, 106 Harv. L. Rev. 163, 273 (1992) (Justice Kennedy "agreed with [the Court] that a regulation that rendered property valueless requires compensation, but he added that this finding must be evaluated 'by reference to the owner's reasonable, investment-backed expectations.'"); David L. Callies, *Regulatory Takings and the Supreme Court*, 28 Stetson L. Rev. 523, 557 (1999) (criticizing a state court for "misread[ing] the Kennedy concurrence to be a part of the opinion and engraft[ing] the 'reasonable, investment-backed expectations' standard onto the per se rule").

What astonishes about this proposition is that the denial of Good's permit request was not based on the RHA, the CWA, or the servitude. Indeed, despite all these requirements, the Army Corps of Engineers issued Good no fewer than *three* permits in the 1980s. *See* Pet. App. 3a, 5a; Opp. 5 & n.8 The issuance of these three permits demonstrates that Good's expectations were not just reasonable—they were actually borne out.[9]

Good was ultimately denied federal permission to develop his property because in 1990 and 1991 the marsh rabbit and the silver rice rat were placed on the endangered species list. Thus, the government regulation against which Good's expectations must be measured is the Endangered Species Act, not the RHA, the CWA, or the navigational servitude. And Good could not possibly have known that the ESA would frustrate his plans because he purchased his property months *before* the ESA was enacted and some *17 years* before the two species were listed as endangered. *See Florida Rock Indus., Inc.* v. *United States,* 45 Fed. Cl. 21, 39-40 (1999) (property owner's expectations were reasonable since the CWA was enacted after purchase of the land). The Government claims that "each of the federal permit requirements relevant to this case was already in effect," Opp. 2, but the relevant fact is that the ESA was not.[10] This is not a case in which a property owner

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[9] There can be no argument that Good's takings claim fails simply because of the RHA permit requirement and the navigational servitude. *See United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985) ("the very existence of a permit system implies that permision may be granted, leaving the landowner free to use the property as desired"); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 172 (1979) ("this Court has never held that the navigational servitude creates a blanket exception to the Takings Clause"); Pet. App. 48a (rejecting argument that the servitude defeats Good's takings claim).

[10] The Government misleadingly reformulates the second question presented to suggest that Good's permit was denied under the

is complaining about restrictions already in effect when he purchased his land. Indeed, the Government later concedes that the enactment of the ESA "changed the governing legal regime." Opp. 13.

At bottom, then, the Government's theory is that there was no taking in this case because Good's land at the time of purchase was already regulated by statutes and doctrines *other than* the ESA—the law that actually barred his development. The implications of this theory for property rights and property owners are far-reaching indeed. Under the Government's theory, there can be no reasonable, investment-backed expectations where the property in question is subject to regulation (which applies to virtually all property), because the property may thereafter be burdened by additional regulation. As Judge Williams has written, "except for a regulation of almost unimaginable abruptness, all regulation will build on prior regulation and hence be said to defeat any expectations. Thus regulation begets regulation." *District Intown*, 198 F.3d at 887 (opinion concurring in the judgment). Not much remains of the Takings Clause under this theory.

The Government does not dispute that the decision below conflicts with the cases discussed on page 24 of the petition, in which it was held that property owners had reasonable expectations despite having purchased after the regulation. And the decision below also conflicts with *Lopes* v. *City of Peabody*, 629 N.E.2d 1312 (Mass. 1994), which involved an ordinance barring any new building projects within a designated "wetlands conservancy district." Lopes acquired land within such a district

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RHA and CWA. Opp. i. There is no question, however, that the permit was denied "pursuant to the Endangered Species Act." Pet. App. 16a.

six years *after* the ordinance was enacted, but the Supreme Judicial Court said that fact was irrelevant:

> A rule that purchasers of real estate take subject to all existing zoning provisions without any right to challenge any of them would threaten the free transferability of real estate, ignore the possible effect of changed circumstances, and tend to press owners to bring actions challenging any zoning provision of doubtful validity before selling their property. [*Id.* at 1315.]

Notably, the Federal Circuit's opinion in this case has already been cited twice in support of holdings that property owners lacked reasonable, investment-backed expectations. *See District Intown*, 198 F.3d at 884; *Palazzolo* v. *State of Rhode Island*, —— A.2d ——, 2000 WL 225574, at *9 (R.I. Feb. 25, 2000). The fact that other courts have followed the Federal Circuit's opinion only confirms the Justice Department's initial assessment, made in a press release announcing its victory below, that this is a "significant" and "precedent-setting" case. Pet. 2, 26. There is true confusion in this area of law, and unless this Court corrects the Federal Circuit's erroneous analysis, the opinion of the court below will surely have a pernicious influence on the decisions of other courts.

3. The Government contends that this case is "an inappropriate vehicle" for resolving the first question presented because, it argues, Good's property was not deprived of all value. Opp. 20.[11] This is pure obfuscation.

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[11] It is important to note that the Government is *not* arguing that the judgment below can be defended on the alternative ground that Good's property was not, as a factual matter, deprived of all value. Because the trial court granted summary judgment in the Government's favor on this issue, the judgment below could now be upheld on that ground only if Good failed to generate a genuine issue of material fact on the issue. *See* Fed. R. Civ. P. 56(c). The Government does not contend that it could make such a showing to this Court. Furthermore, it is fair to assume that if the Fed-

The Federal Circuit did not dispute that Good suffered a total loss; the court assumed he did and ruled on the basis of the expectations factor alone. Pet. App. 9a. Thus, a perfectly clean legal issue is presented.

In any event, the facts are contrary to the Government's contention. In 1973, Good and his mother paid $2 million for a group of properties that included the 40 acres at issue here. Pet. App. 20a. Good acquired his mother's 30% interest in the properties when she died in 1975, and at that time the 40 acres were appraised for federal inheritance tax purposes as having a fair market value of $153,717. C.A. App. 389.[12] Good subsequently invested some $95,000 in the property. Pet. App. 20a n.3.

The reasonable and prudent alternatives ("RPAs") initially suggested by the Fish and Wildlife Service ("FWS") in 1991 would have restricted development to the eight acres of uplands, and Good submitted unrebutted evidence that the cost of developing the uplands by themselves would exceed the revenue to be generated from such development, because lots lacking water access would not be marketable. C.A. App. 628-636. FWS revised its RPAs in 1995, but this was only *after* Good had filed suit in 1994 alleging a taking of his property.[13]

The contention of the Government's appraiser, Slack, that the property had transferable development rights ("TDRs") worth $112,000 wholly ignored the fact that

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eral Circuit could have affirmed the trial court's grant of summary judgment on this issue, it would have done so.

[12] Good offered evidence that his basis in the property was $92,718.78 (C.A. App. 211, 256), and the Court of Federal Claims accepted that figure. Pet. App. 20a.

[13] The reasons why Good declined to participate in the revision of the RPAs in 1995, a process instituted *after* he filed suit, have been fully explained previously. *See* Good's C.A. Br. 21-26. This issue was not relevant to the Federal Circuit's decision, and the court did not address it.

the property was not zoned for the sale of TDRs (C.A. App. 399), and improperly assumed that TDRs can constitute just compensation. *See Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725, 747-749 (1997) (Scalia, J., joined by O'Connor & Thomas, JJ., concurring in the judgment). Furthermore, $112,000 would hardly be just compensation in this case; Slack himself testified that, with the permit Good seeks, the land would be worth $1.2 million. C.A. App. 394. Good's own appraiser valued the property at $1.54 million with the permit. C.A App. 636.[14]

* * * *

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

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[14] The Government suggests that this valuation requires a finding that Good would have been able to obtain the necessary state and local permits (Opp. 21), but the Court of Federal Claims fully considered and rejected that very argument. Pet. App. 62a-68a. In any event, Good clearly was capable of obtaining such permits, since he did. By mid-1984, "Good had received federal, state, and county approval to develop the property." Pet. App. 3a.